

# A CRITIQUE OF PROCEDURALISM IN THE ADJUDICATION OF ELECTORAL DISPUTES IN LESOTHO

*Hoolo 'Nyane*

Hoolo 'Nyane is Associate Professor and Head of Public and  
Environmental Law, School of Law, University of Limpopo

## ABSTRACT

*One of the characteristic features of electoral democracy in Lesotho is disputed elections. Since 1993, when the country returned to constitutional democracy after a long haul of dictatorship and monarcho-military rule, every election has been subjected to one form of discontent or another. The aggrieved parties use various ways to vent their dissatisfactions, and more often than not, disputes end up in the courts of law. The courts are then called on to determine the validity or otherwise of the election results declared by the election management body. All seven elections since 1993 have been challenged in the courts of law. Despite this determination by political players in Lesotho to resolve electoral disputes through the courts of law, amongst other means, there is no court in Lesotho that has overturned an election result or ordered the reallocation of seats since 1993. The petitions are almost invariably dismissed on procedural grounds or on the basis of misapplication of the substantial effect doctrine. This approach to the adjudication of disputes in Lesotho has not only jeopardised substantive electoral justice in the country but has also arguably perpetuated the electoral violence that has been one of the characteristic features of electoral politics in Lesotho. The purpose of this article, therefore, is to critique this approach. Methodically, the paper uses the politico-legal approach to critique the pattern as it manifests itself through the many court decisions that have been handed down on election petitions since 1993.*

**Keywords:** adjudication of election petitions, electoral system, electoral law, Lesotho, constitution, substantial effect doctrine

## INTRODUCTION

The history of elections in Lesotho is punctuated by a constant pattern of electoral disputes. In these disputes the judiciary features pre-eminently because these disputes invariably end up in the courts of law. This pattern dates back to Lesotho's maiden parliamentary election in 1965 held on the eve of independence, to be given to the country in 1966 by the United Kingdom. Thus, the election was critical because it had a direct bearing on the post-independence pathway the country was going to take. The election was fiercely contested but in the end the Basutoland National Party (BNP) narrowly secured a win. This win by the BNP was not accepted by the Basutoland Congress Party (BCP). As Shale (2008, p. 114) contends, 'since 1965 opposition parties have questioned the legitimacy of the incumbent government. Their objections have been expressed in various ways, all of which have had a negative impact on the stability of the kingdom'. The BCP could not accept the reality that despite its overwhelming victory during the local government election in 1960, it lost the parliamentary election only a mere five years down the line (Matlosa 1993). Nevertheless, BNP was endorsed as the winner and the transition from colonial rule to independence was under its aegis. This included the adoption of the new Constitution. As was expected, the five years between 1965 and 1970 were not smooth sailing for the ruling BNP. The opposition marshalled all manner of alliances, including an alliance with the chieftaincy, to unsettle government. The strategy seems to have worked because at the next election in 1970 the opposition managed to dislodge the government. The 1970 election has been subjected to many studies (Weifelder 1977; Macartney 1973); but for present purposes it suffices to state that the election was disputed. After a colossal defeat by the opposition, the ruling BNP refused to accept the outcome of the election, suspended the constitution and arrogated power. The nascent post-independence judiciary, which still consisted largely of expatriate judges, never had an opportunity to investigate the veracity of the alleged election manipulation. The country started a long haul that spanned the period from 1970 to 1986 of mono-rule by BNP, continued by the monarcho-military rule between 1986 and 1993 (Mothibe 1990).

In 1993 the country returned to constitutionalism and electoral democracy. The first democratic election was held on 23 May 1993 after two decades of virtual dictatorship. This transition too has been a subject of equally long and worthy scholarly analysis, including the investigation edited by Southall and Petlane (1995). The interesting aspect for the present analysis is that the election was won overwhelmingly by the BCP. Similarly, its arch-rival, the BNP, did not accept the election outcome. It launched no less than 28 election petitions in the courts of law seeking to demonstrate how in those constituencies there were irregularities

that substantially affected the results. The analysts were quick to dismiss those petitions as baseless and they proceeded to sketch out superficial reasons that led to the abysmal performance of BNP in the election (Southall 1994). In fact, Sekatle (1995) contends that the allegations of election rigging were spurious as they were 'founded much more upon a pervasive lack of trust which exists between politicians in Lesotho than upon any firmly grounded evidence' (ibid. p. 105). Contrarily, the painstaking analysis of those petitions reveals much about the role of the judiciary in electoral justice in Lesotho. The analysis of the case of *Moupo Mathaba and Others v Enoch Lehema and Others* (1993), which came so early in the consolidation of a newly reborn democracy, reveals a monumental assault on electoral justice in the country. Surprisingly, this case became the revered authority and precedent for the abuse of the substantial effect doctrine in electoral adjudication in the country.

The succeeding election of 1998 was won by the then newly founded Lesotho Congress for Democracy (LCD). This election has also been a subject of analysis but, as with all other elections, the role of the judiciary has been handled with much trepidation (Shale 2008). The allegation of rigging in this election was so serious that when the courts failed to dispense electoral justice, the aggrieved parties, led by BNP, organised widespread protests. In the ensuing violence the country teetered on the brink of anarchy with looting and burning in the capital, Maseru, resulting in foreign intervention. Arising out of this the election was investigated under the auspices of Southern African Development Community (SADC). The eminent judge from South Africa, Pius Langa, found in his investigation that there were indeed irregularities but these were not sufficiently substantial as to affect the validity of the election outcome (Langa 1998). His findings have attracted much commentary, largely critical. One scholar disparages the report in that its finding was 'rather [a] limp finding – [which] gave some measure of satisfaction and dissatisfaction to both the government and the opposition parties' (Southall 1998, p. 682).

The pattern seems to be the same throughout all the following elections with a noteworthy abuse of the substantial effect doctrine in favour of proceduralism. The intention of this article is not to analyse the seven elections held since 1993, for that has been ably and extensively handled elsewhere.

The mainstay of the present analysis is to critique the jurisprudence of proceduralism that seems to have taken root in electoral adjudication in Lesotho. This jurisprudence is manifested through the many court decisions that have been handed down on election petitions in Lesotho and, to some extent, in the constitutional and statutory framework. Methodically, this purpose will be attained by studying the key judgements that anchor this jurisprudence and the legal instruments on election disputes resolution such as the Constitution of Lesotho (1993) and National Assembly Elections Order (1992) and National

Assembly Electoral Act (2011)<sup>1</sup>. The first section of the paper posits its argument within its theoretical framework. The second section deals with legal framework for electoral dispute resolution as a precursor to the essence of the paper embodied in the third section – the actual case-by-case analysis of the jurisprudence of the superior courts in Lesotho on election petitions. A purely legalistic methodology for a study that straddles both political and legal disciplines would not be appropriate. As Nkansah argues, the ‘purely legal doctrinal analysis alone will not suffice as it will not exhaust the domain for the examination and analysis for [this kind of] study. It will be woefully limited in terms of content and context’ (Nkansah 2016, p. 100). As such, the study is not limited to an analysis of cases; it also uses a wide array of sources such as commission reports, media, official statements, laws and regulations. It also critically evaluates existing literature on election dispute resolution in Lesotho.

## GENERAL PRINCIPLES AND THEORY ON ADJUDICATION OF ELECTORAL DISPUTES

### *The Notion of Election Petition and its Origins*

The concept of election petition, now widely used and accepted in electoral law practice in Lesotho and elsewhere, has its origins in British electoral history (Jack et al. 2011). The ascendance of electoral democracy and extension of franchise in Britain in the 19<sup>th</sup> century brought with it all manner of contestation around purity of elections as a means of selecting members of parliament. From early in the evolution of elections, corruption and improper practices have been a major threat to the purity and freedom of electoral outcomes (O’Leary 1961). These grievances about elections and the return of members of parliament have always been the preserve of the House of Commons. It was ‘the sole proper judge’ of its members’ returns, ‘without which the freedom of election were not entire’ (*R (Woolas) v The Parliamentary Election Court*, 2010). As far back as 1604 the Commons Committee, which was entrusted with elections petitions, boldly asserted that:

We avouch that the House of Commons is the sole proper judge of return of all such writs and of the election of all such members as belong to it, without which the freedom of election were not entire: And that the Chancery, though a standing court under your Majesty, be to send out those writs and receive the returns and to preserve them, yet the same is done only for the use of the Parliament, over which neither the Chancery nor any other court ever had or ought to have any manner of jurisdiction.

(*Woolas* para 23)

---

1 Under the military government laws were styled Orders.

Thus, the resolution of election-related disputes has been the province of parliament, pretty much to the exclusion of the traditional courts, and the system was virtually non-judicial in nature. It later became apparent that partisanship was eroding the credibility of the House decisions on elections and the ultimate diminution of public confidence in elections as a whole. This necessitated the drift from a parliament-based to a judicial resolution of disputes. The judiciary was initially loath to take on the new task of adjudicating election disputes. This attitude of the judiciary was expressed by the Chief Justice to the Lord Chancellor on the 6<sup>th</sup> February 1868:

This confidence will speedily be destroyed, if, after the heat and excitement of a contested election, a judge is to proceed to the scene of recent conflict, while men's passions are still roused... The decision of the judge given under such circumstances will too often fail to secure the respect which judicial decisions command on other occasions. Angry and excited partisans will not be unlikely to question the motives which have led to the judgment. Their sentiments may be echoed by the press.

*(Woolas, 24E)*

This aversion of the judiciary towards electoral disputes notwithstanding, the transition from the legislative to a judicial electoral dispute resolution mechanism was facilitated for the first time through the Parliamentary Elections Act of 1868. Antiquated as the legislation might seem, it remains very important in understanding the election petition as it is commonly used and applied today in many jurisdictions, including Lesotho. The legislation did not only empower the Court of Common Pleas to determine and try election disputes but it was also to be presided over by a judge. The classical essence of an election petition is embodied in section 11(13) of the Act which empowered the presiding judge at the conclusion of the trial to:

... determine whether the member whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the Speaker, and upon such certificate being given such determination shall be final to all intents and purposes.

This conceptualisation of an election petition has, by and large, been replicated in contemporary electoral statutes. The Representation of People Act of 1983 posits

that 'no parliamentary election and no return to parliament shall be questioned except by a petition questioning an undue election or undue return' (Section 120(1)). The Constitution of Lesotho (1993) still retains the same formulation wherein section 69 empowers the High Court with the exclusive jurisdiction to determine whether 'any person has been validly elected as a member of the National Assembly'. It would seem that Lesotho's definition of election petition is very narrow; it restricts the ambit of the concept only to electoral disputes on whether a person has been validly elected as a member of the National Assembly. It does not extend to other disputes, however election related they may be, such as registration, nomination or even counting. In the case of *National Independent Party (NIP) and Others v Manyeli and Others* (2007), for instance, the Court of Appeal excluded a dispute relating to the submission of party lists for the purpose of proportional representation seats in the run-up to the election.

### *The Doctrine of Substantial Effect*

One of the central doctrines in the adjudication of election petitions is the time-honoured doctrine of substantial effect which originates from British electoral law. The doctrine still resonates with the historical origins of election petitions. As demonstrated in the foregoing discussion, election petitions were not initially legal processes per se; they were parliamentary processes concerned with the substance of the complaint about returns rather than the legal technicalities of the case. The doctrine has been the recurring bulwark of electoral legislation since the transfer of electoral disputes adjudication from parliament to the judiciary in 1868. Presently it is embodied in the United Kingdom Representation of People Act (1983) under section 23(3), thus:

No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary elections rules if it appears to the tribunal having cognizance of the question that—

- (a) the election was so conducted as to be substantially in accordance with the law as to elections; and
- (b) the act or omission did not affect its result.

This doctrine has been replicated in the Lesotho National Assembly Election Order of 1992. Section 104(2) of the Order posits that when deciding election petitions, the High Court shall be guided by 'substantial merits ... without regard to legal

form or technicalities, and shall not be bound by rules of evidence'. The principle has been retained under section 130(3(a) of the new National Assembly Electoral Act of 2011. This doctrine seems to reverberate throughout electoral legislation in most African countries. However, African judiciaries often abuse the doctrine in order to maintain the status quo rather than preferring substance over form, which is the thrust of the doctrine. This approach of African countries has been widely criticised (Kaaba 2015; Azu 2015; Nkansah 2016). For instance, Kaaba (2015, p. 345) notes that 'the substantial effect rule has worked in the most disingenuous way in Africa to uphold elections fraught with major irregularities and fraud'. Consequently, other African countries such as Kenya and Zambia have elevated the notion of substantive justice to the constitutional level. For instance, Sec 159(2) (d)) of the Kenyan Constitution (2010) provides that 'justice shall be administered without undue regard to procedural technicalities.'

Lesotho has not yet raised the notion to constitutional level. The doctrine remains as a statutory injunction. Hitherto, there is no court in Lesotho that has ever overturned an election result since the return to electoral democracy in 1993, arguably because of the misapplication of this doctrine. The problem is, nevertheless, not peculiar to Lesotho; most African judiciaries often misapply the oft-quoted principles of this doctrine as outlined by Lord Denning in the celebrated decision in *Morgan v Simpson* (1974). This was the petition concerning the local election for the Greater London Council in 1973. It so happened that 44 ballot papers were inadvertently not stamped by election officials and as such not counted. The candidate who was declared a winner had a majority of 11, and if the uncounted papers were included the rival would have won by 7 votes. The defence of the election management body was, as usual, that the omission was a small technical error which might not invalidate an election by the principle of substantial effect. The court disagreed and made three very important guidelines in the application of this principle. The guidelines are that:

- if the election was conducted so badly that it was not substantially in accordance with the election law, the election would be vitiated, irrespective of whether or not the result was affected.
- if the election was so conducted that it was substantially in accordance with the law as to elections, it would not be vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election.
- even though the election was conducted substantially in accordance with the law as to elections, if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election would be vitiated.

Most judiciaries handling election petitions, including Lesotho's judiciary, are aware of these impeccable guidelines but often misapply them to justify their preference of form over substance.

### *Adjudication and Proof of Election Petitions*

One of the key features of an electoral court which often eludes the High Court of Lesotho and other superior courts in Africa, is that it has the discrete feature of inquisitorial adjudication. The common law practice of adjudication of disputes is ordinarily adversarial, whereby the court sits passively to hear the case of each party before it within strict rules and procedures. An election court is an exception to this practice. It is not bound by the strict procedures and rules of evidence that are common with ordinary adjudication; it goes even beyond the evidence already provided by the parties to inquire into the substance of the allegations made. This approach resonates with the emergent tenets of legal realism which rejects legal formalism. While it has its origins in American legal thought, it has taken root in most jurisdictions throughout the world (Hawthorne 2006). In Lesotho, the Court of Appeal warned of the dangers of legal formalism in the case of *National University of Lesotho v Motlatsi Thabane* (2008 para 4) thus:

... formalism in the application of the Rules should not be encouraged. Opposing parties should not seek to rely upon non-compliance with the Rules injudiciously or frivolously as an expedient to cause unnecessary delay or in an attempt to thwart an opponent's legitimate rights.

The influence of legal realism notwithstanding, the adjudication of electoral disputes continues to be entrapped in the morass of legal formalism. The electoral courts have consistently battled with the notions of burden and standard of proof in electoral petitions (Hatchard 2015). On the burden of proof, the ordinary tenets of the law of evidence are that the person who makes the allegation must have proof (Belengere et al. 2013). The onus is therefore on the petitioner to prove electoral irregularity. However, 'once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election...then the evidentiary burden shifts to the respondent... to adduce evidence rebutting that assertion' (*Raila Odinga case* 2017 para 133). The onus of rebuttal then shifts to the election management body to demonstrate that the election was substantially conducted in compliance with the law.

These principles present consistent pragmatic challenges to petitioners in African elections because many a time the best evidence in electoral disputes is

to be found in electoral materials such as used ballot papers, which invariably are in the hands of the respondents. Thus, it is virtually impossible that the petitioner can approach a court of law already armed with evidence which is in the hands of the opponent. This is the problem confronted by the petitioner in the most recent Zimbabwean case of *Nelson Chamisa v Emerson Mnangagwa and Others* (2018). The court dismissed the petition on the grounds, inter alia, that the petitioner failed to discharge the burden of proof by producing primary evidence in the form of ballots and V11 Forms. This position of the court does not accord with the principles of the adjudication of electoral disputes. The court ought to have been inquisitorial and called that kind of evidence it considered crucial for deciding the petition in a just and fair manner; rather than being adversarial and expecting the petitioner to produce evidence that is for all intents and purposes in the hands of the respondents (O'Leary 1961).

Alongside the notion of the burden of proof is that of the standard of proof. In ordinary common law practice, the standard of proof in civil matters is on the balance of probabilities. This is a lower scale than used in criminal matters; the criminal scale is higher as it requires proof beyond reasonable doubt. There is a raging controversy on whether the standard in election petitions is a civil or criminal standard. This controversy is based on the fact that more often than not, there are quasi-criminal allegations made in election petitions such as bribery, fraud, corruption and undue influence. In ordinary litigation, allegations about violations of electoral law are civil and therefore proof would ordinarily require the lower (civil) standard of proof. But this is complicated by the quasi-criminal allegations that often accompany the civil allegations. The Kenyan Supreme Court jurisprudence is much more helpful in solving this conundrum. The court in the landmark decision in *Odinga v Independent Electoral and Boundaries Commission* (2017) struck a sensitive balance between the criminal standard (beyond reasonable doubt) and the civil (balance of probabilities) standard. The court convincingly posited that:

... where no allegations of a criminal or quasi-criminal nature are made in an election petition, an "intermediate standard of proof", one beyond the ordinary civil litigation standard of proof on a balance of probabilities, but below the criminal standard of beyond reasonable doubt, is applied.

The court was building on the jurisprudence it had started in 2013 in the case of *Raila Odinga v Independent Electoral and Boundaries Commission* (2013), where the court had already started to hint that the standard of proof in elections disputes is slightly higher than the civil standard but below the criminal standard; the court should therefore maintain a very sensitive balance between these two scales.

The rationale for this approach is twofold; firstly, it is because of the quasi-criminal nature of some of the allegations which often inhere in elections petitions. Secondly, it is because of the principle of *omnia praesumuntur rite et solemniter esse acta* (the presumption of correctness or validity of an election). There is an existing rebuttable presumption that when people have voted, such election is valid and must be given effect. In the Kenyan case of *Steven Kariuki v George Mike Wanjohi & Others* (2013), the court held that the presumption, albeit rebuttable, operates in favour of the respondents that the election was conducted properly and in accordance with the law. Therefore, the court of law must be slow to invalidate an election unless there is compelling evidence to the contrary. Thus, although an election petition concerns one or two people that have approached a court of law to vent their grievance, it does not exclusively concern those petitioners. It concerns the broader citizenry that has voted with a view to selecting the ruler or rulers within the confines of the law. Hence, it is a litigation *sui generis* (of special kind) that must be understood for what it really is.

#### CONSTITUTIONAL AND STATUTORY FRAMEWORK FOR ADJUDICATION OF ELECTION PETITIONS IN LESOTHO

One of the central planks of the 1993 Constitution of Lesotho is the right accorded to citizens to elect representatives. Section 20 of the Constitution gives to every citizen a right to 'take part in the conduct of public affairs, directly or through freely chosen representatives' and to be able 'to vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot'. This injunction is a bridge from the immediate past that spanned the period from 1970 to 1993 when the government of Lesotho was not based on the will of the people. Thus, the Constitution had foreseen that elections, however central they might be to the new dispensation, may be disputed. Consequently, it provided for an election dispute resolution mechanism.

Unlike other Commonwealth countries where the election disputes are decided by the apex courts, the Constitution of Lesotho vests the original jurisdiction in the High Court, not the Court of Appeal. Section 69 of the Constitution empowers the High Court with exclusive jurisdiction amongst others, 'to hear and determine any question whether...any person has been validly elected as a member of the National Assembly'. In terms of the original Constitution (1993), the High Court was not only empowered with original jurisdiction, but its decision was not appealable. Section 69 (6) unequivocally provided that 'the determination by the High Court of any question under this section shall not be subject to appeal'. The rationale for the finality clause in the election petitions is that, whilst everyone has a right to seek recourse from the courts for any

grievance, post-election litigation has the potential to 'harm the ideals of finality, certainty, and legitimacy in the election process' (Douglas 2013, pp. 1019). In fact, there are scholars who strongly recommend measures to discourage post-election litigation completely or, at least, impose measures to disincentivise it. The proposed measures range from finality clauses, strict procedures and heavy costs for such litigation (Douglas 2013). However, another scholarship, which is rights-based in its inclination, proposes that any person who is aggrieved must vent his dissatisfaction in the highest court in the country. In any event it would be unfair to discriminate electoral litigants from all other litigants (Ishola 2014).

The Parliament of Lesotho was persuaded by this latter view in 2011 when it removed the finality clause in the Constitution of Lesotho through the enactment of the Sixth Amendment to the Constitution of Lesotho (2011). The Amendment effectively provided for the right of appeal in election petitions to the apex court, the Court of Appeal. Since the enactment of this Amendment, few cases have been pursued before the Court of Appeal (*Basotho Democratic National Party v The Independent Electoral Commission and Others* 2015).

As the Constitution decrees, parliament may make provision for 'the circumstances and manner in which and the conditions upon which any application may be made to the High Court for the determination' of an election petition. The first statute on elections in general and election petitions in particular was the National Assembly Election Order of 1992. This Act enshrined two fundamental principles of election petitions: the first being the substantial effect doctrine. Section 104(1) of the Act provided that:

In determining a petition, the High Court shall be guided by the substantial merits of the case and good conscience, without regard to legal form or technicalities, and shall not be bound by the rules of evidence.

The same doctrine is reiterated in section 107(4) of the Act. The most important rules of evidence which the Act does away with relate to the burden and standard of proof. The section is clearly based on long-established jurisprudence which has its origins in English electoral law.

The second principle manifested by the Act is to be found in section 104(3); that an election court, unlike conventional courts, is inquisitorial as opposed to being adversarial. This section provides that in deciding on an election petition the High Court may, on its own motion, compel the attendance of witnesses and it may examine those witnesses. This principle, as will more fully be demonstrated in the succeeding section, is often missed by the courts. The courts are always influenced by the dictates of adversarial practice wherein the courts passively

observe as parties present their cases, and then decide afterwards; and oftentimes the petitioners are left with the burden and high standard of proof.

The 1992 law has been replaced by the National Assembly Electoral Act of 2011. This new Act retains the same principles embodied under the 1992 Order relating to the substantial effect doctrine and the inquisitorial nature of the court presiding on election petitions (Section 27).

## PROCEDURALISM IN THE ADJUDICATION: CRITIQUE OF SELECTED PETITIONS

### *The 1993 Election Petitions and the Precedent of Proceduralism*

The National Assembly Election held on the 27 May 1993 remains important in many respects for the development of constitutional democracy. For purposes of this study its importance is that the precedent for proceduralism in election petitions in Lesotho was set in the aftermath of this election. In this highly charged election, the main contenders were the Basutoland Congress Party (BCP) and Basotho National Party (BNP). The BCP won the election, much to the chagrin of BNP, by winning the popular vote by 74% while BNP got a meagre 22.5% (Southall 1993). The BNP was generally dissatisfied with the election results but its candidates filed individual petitions in 28 constituencies. All 28 petitions were consolidated in the oft-quoted case of *Moupo Mathaba and Others v Motlasele Lehema and Others* (1993). Although all the candidates were BNP candidates, they instituted separate petitions because the law at the time did not permit political parties to challenge the election results. This was largely due to the majoritarian electoral system used at the time in terms of which candidates were theoretically regarded as individuals, even when they are endorsed by political parties (Mahao 1998). However, when these election petitions were pending, the BNP instituted another case in *Basotho National Party v Principal Secretary of Ministry of Law, Parliamentary and Constitutional Affairs and Others* (1993). It is important to note that although it was seeking to stay the proceedings in the *Moupo Mathaba case*, the BNP case was not instituted as an election petition per se, but as a normal urgent application in the High Court. The main grievance in the BNP case was that the applicant (BNP) alleged that the ballot envelopes for all the disputed constituencies had been removed from the care and custody of the Chief Electoral Officer to the care and custody of the Principal Secretary of the Ministry of Justice and Prisons after the 28 petitions had been filed; and that the ballot envelopes had already been tampered with. It was alleged further that there had been a general re-packing of ballot papers in contravention of the law. The applicant contended that it was concerned that:

... the purpose for the removal of the ballot envelopes from the office of the Chief Electoral Officer to the office of the Principal Secretary of Law Parliament and Constitutional Affairs at the Government Complex is sinister and is likely to prejudice the scrutiny that is called for in various election petitions by the candidates of Applicant.

The court did not understand the *BNP case* as an interlocutory matter to the main case; neither did it investigate the veracity of the factual allegations made therein, and the law relating to the storage and disposal of ballot papers. Instead, it easily veered into proceduralism. The main procedural points on which the case ultimately turned were jurisdiction of the court and the *locus standi in judicio* (standing) of the applicant. The jurisdictional point arose as a result of the fact that the case was instituted as an ordinary application, not an election petition. The court was very quick to rule that the High Court cannot decide an election-related matter in its ordinary jurisdiction. The court contended that:

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

This reasoning is overly formal and technical. The High Court of Lesotho is empowered by the Constitution to adjudicate the electoral petitions. The fact that a provision of the electoral statute (section 100) provides that the High Court shall be 'a Court of Disputed Returns' should not be interpreted in a manner that undermines the Constitution. In any event, the *BNP case* was an ancillary matter to the main election petition in *Moupo Mathaba case*. The least the court could have done (particularly as it was the same court) would have been to consolidate it with the main petition.

On *locus standi*, the court relied on section 101(2) of the National Assembly Election Order (1992) which provided for only three categories of people who could bring an election petition to court: namely, an elector whose name appears on the electoral list for the constituency concerned, a candidate, and the Attorney General. The section did not allow political parties to institute an electoral petition because of the electoral system which was then constituency-based.

Having dismissed the *BNP case* on the basis of proceduralism, the same court mutated into a Court of Disputed Returns and perpetuated the same formalism into the main *Moupo Mathaba case*. This case consolidated all 28 election petitions filed by BNP candidates in 28 of the 65 constituencies countrywide. The

petitions were based on many allegations, but for purposes of this paper, one major allegation will be interrogated. The one allegation that permeated almost all the other allegations was that people were allowed to vote without proper verification of their registration status, in contravention of section 79(3)(b) of the National Assembly Election Order (1992). The section imposes an obligation on presiding officers at polling stations to ascertain whether the aspiring voter is properly registered for the constituency concerned and to inspect the hands of the aspiring voter to ensure 'that no ballot paper has previously been used to the applicant at that or another polling station at the election'. This provision is therefore fundamental as it operationalises the higher principle of 'one person one vote', and is also a backstop against electoral malpractice such as multiple voting. On this allegation, evidence was led which indeed proved to the satisfaction of the court that section 79 of the National Assembly Election Order (1992) was violated. The court then made a finding that 'the conduct of the Presiding Officer[s] constituted non-compliance with procedure prescribed section 79(3) (b) of the National Assembly Election Order (1992) and provisions of subsection 4 of section 107 apply' (ibid., p. 419). Thereafter the court ran into the clear difficulty of applying the substantial effect doctrine as embodied under section 107(4) of the National Assembly Election Order (1992). The section provides that a court may not invalidate an election of a candidate on the grounds that a procedure prescribed by the law has not been complied with or that there was an irregularity, 'unless the court is satisfied that the non-compliance irregularity would or could have affected the result of the election'. Having found that people voted in clear violation of section 79(3) (b), the court then avowedly ran into the problem of applying the substantial effect doctrine to the situation at hand. It candidly declared its difficulty as follows:

I am in some difficulty here ... Which standard then applies: can the court avoid the election if satisfied that the result of the election could have been thereby affected, or can it only do so where satisfied that the result was affected? The difficulty is apparent and I would respectfully refer the provisions of section 107 to the consideration of the Parliamentary Draftsman.

(ibid., pp. 419-420)

The court was clearly having some difficulty with a problem that has been resolved elsewhere. The principle laid down in the time-honoured decision in *Morgan v Simpson* (1974) is that if the election was conducted so badly that it was not substantially in accordance with the law regarding elections, the election would be vitiated, irrespective of whether the result was affected or not. The

clear issue in the *Moupo Mathaba case* was that the court was confronted with a situation where it made a finding that in some constituencies people voted without verification regarding whether they had previously voted, in violation of the law. In that situation there is the real possibility, which the court did not establish, that there were duplicate voters, a situation that clearly undermines the outcome of the election in the constituencies concerned. So, the elections in those constituencies were not conducted according to the law, and stood to be vitiated. That notwithstanding, the court easily concluded that 'the omission by the presiding officer did not affect the result of the election' (*ibid.*, p. 420), and proceeded to dismiss the petitions as having no merit.

*The 1998 and 2002 Elections: the Perpetuation of Proceduralism and Abuse of the Substantial Effect Doctrine*

The 1998 election will go down in the history of Lesotho as the most controversial and fiercely contested of its elections. The election was held on the 23 May under the plurality electoral system. The then newly-founded Lesotho Congress for Democracy (LCD) won 79 of the 80 constituencies countrywide; the BNP won 1 constituency. The disproportion brought by the electoral system has been a subject of intense investigation (Elklit 2002; Southall & Fox 1999; Mahao 1998). The election outcome was heatedly disputed by the three main opposition parties: BNP, BCP and Marematlou Freedom Party (MFP). After instituting their own private audit of the result, the parties launched their petition, conjointly in the case of *Moeketsi Tsatsanyane and Others v Litsitso Sekamane and Others* (1998). The petitioner sought, amongst others, 'an order setting aside the results of the candidates returned in the various constituencies in terms of the general elections held on the 23 May 1998' (*ibid.*, p. 2). Since the protests had already attracted the attention of the international community an international expert commission was appointed under the aegis of the SADC while the case was pending. The Commission was led by Justice Pius Langa, a judge from South Africa, and it will hereafter be called 'Langa Commission'. When the Langa Commission was instituted, the petitioners in the *Tsatsanyane case* were persuaded, and they agreed, to withdraw their petition in order to allow the investigations of the Commission to proceed unimpeded. The task of the Commission was virtually to do that which the petitioners had sought the court to do; amongst others, to 'inquire into all matters relating to the alleged irregularities in respect of the 1998 national elections in Lesotho' (Langa Commission 1998, p. 2). The Commission had far-reaching powers despite the limited time it had to scrutinise the entire balloting. In order to empower it, parliament enacted the National Assembly Election (Amendment) Act of 1998 to enable the Commission to re-open the ballot boxes for the purposes of a recount.

After a recount in 66 constituencies, the Commission noted that the results were not reconcilable because 'there were discrepancies between the total on the A45's and the announced results, which are captured in the A47's' (ibid., p. 22). This finding was profound. However, the Commission conveniently opted, perhaps with the influence of the precedent set by the *Moupo Mathaba case*, to invoke the substantial effect doctrine. Consequently, the Commission found that:

We are unable to state that the invalidity of the elections has been conclusively established. *We point out, however, that some of the apparent irregularities and discrepancies are sufficiently serious concerns. We cannot however postulate that the result does not reflect the will of Lesotho electorate. We merely point out that the means for checking this has been compromised and created much room for doubt.* (emphasis added)

(ibid., p. 28)

Clearly, the Commission was trying to walk a very tight rope; its conclusion was not in keeping with its own findings of pervasive violation of the electoral law. Much more importantly, the Commission found that there were 'discrepancies between the results of the recount and those announced by the IEC' (ibid., p. 27). The consequences of this incongruent finding were devastating as large parts of the capital Maseru and other major centres were torched by protesters who were struggling for electoral justice. Such electoral justice could not be provided by either the courts of law or the Langa Commission. As a result, the concerned parties agreed to a fresh election within 18 months in terms of the Interim Political Authority Act (1998).

The 2002 election, which succeeded the aborted 1998 election, was not free from electoral dispute either, although of a lesser magnitude. The election was held under the then newly adopted mixed member proportional (MMP) electoral system. The election result was still disputed in the case of *Thebe Motebang v The Returning Officer for the Constituency of Khafung* (2002). The petitioner was the candidate for the newly-founded Lesotho People's Congress (LPC) which was also a breakaway from the ruling party, LCD. The petitioner wanted the ballots to be scrutinised, the election to be declared invalid and a directive issued for holding a fresh election for the concerned constituency. With the subtle influence of the *Moupo Mathaba case*, the court segued into proceduralism and put primacy on two procedural points raised by the respondents. The first point was the non-joinder of the Speaker of the National Assembly. The respondents contended that the Speaker was a necessary party to the proceedings and should have been enjoined. A non-joinder is, even in ordinary litigation, only dilatory; it does not render proceedings fatally defective. But in this case the court decreed that 'the

petitioner has thus failed to join the Speaker. This in itself is fatal to the petition and on that ground alone the petition would in any case have failed' (ibid., p. 9).

Another procedural technicality on which the case turned was that the petition was filed out of time. Ordinarily, the court has inherent powers to condone non-compliance with times and modes of litigation. This principle was adroitly captured by the Zimbabwean Constitutional Court in the case of *Chamisa v Mnagagwa* (2018) as follows:

It is common cause that the application was eventually served on the respondents...outside of the timeframes stipulated in the Constitution and contrary to the provisions of the Constitutional Court Rules... The applicant clearly breached the Rules of the Court, and filed a defective application. *However, due to the importance of the matter and the public interest, the Court has the power to condone the non-compliance with the Rules in the interests of justice.* (emphasis added)

The court in the *Thebe Motebang* case did not find the need to condone the procedural technicality in the interest of substantive electoral justice. Instead, the court reasoned, rather bizarrely, that 'time is a very important factor in the election petition because every party to the petition must act within a specified timeframe' (ibid., p. 9). This reasoning is not in keeping with the established principles of adjudication of electoral petitions. It also flies in the face of section 104 of National Assembly Election Order (1992) which embodied the substantial effect doctrine.

### *The 2007 and 2015 Seat Allocation Petitions and the Consolidation of Proceduralism*

The problem of proceduralism in election petitions also became evident in the petitions that challenged the allocation of seats in the aftermath of 2007 and 2015 snap elections. In the run-up to 2007, two main political parties, LCD and All Basotho Convention (ABC) entered into pre-election political alliances together with the other two smaller parties, the National Independent Party (NIP) and Lesotho Workers Party (LWP) respectively. LCD formed a pre-election alliance with NIP while ABC formed an alliance with LWP. Since the country was using the mixed member proportional (MMP) electoral system, the two bigger parties wanted to maximise the proportional representation seats in National Assembly. The nature of the agreements was such that the bigger parties would only contest constituency seats while the smaller parties would only contest proportional representation (PR) seats. The only exception to this arrangement was in the case

of the leader of the LWP, Billy Macaefa, who contested the Matelile Constituency under the arrangement with the ABC (Shale 2017). It is generally agreed amongst experts that the arrangement was intended to manipulate the spirit and true nature of the MMP system as the compensatory electoral model. As one observer instructively observes,

It is clear that the LCD/NIP MOU – with the specifications of the party list positions to which each party was entitled – was a deliberate circumvention of the constitution, as amended in 2001. The reason for stating this in no uncertain terms is that the MOU would – if permitted by IEC – secure for the LCD a number of compensatory seats over and above its full complement of seats won in the constituencies.

(Elklit 2008, p. 17)

The High Court of Lesotho had an occasion to determine the propriety of the alliances and the seat allocation in *Marematlou Freedom Party (MFP) v The Independent Electoral Commission and Others* (2007). The thrust of the petition was that, in view of the pre-election alliances, the allocation of seats was not properly done. Consequently, the court must declare the alliances as single entities for purposes of allocating proportional representation seats. This is the substantive question that the court was called upon to determine. In its usual approach, the court veered into pedantic technical issues. Following the long-established precedent from the *BNP case* of 1993, the court dismissed the *MFP case* of 2007 on both *locus standi in judicio* (standing) and jurisdiction (competence). On standing, the court was persuaded by the literal interpretation of section 69 of the Constitution. The section enlisted people who may institute election petitions and did not have 'a political party' in the list of such people. Indeed, the court did not even interpret section 69 in view of the Fourth Amendment to the Constitution of Lesotho (2001) which introduced the proportional representation leg to the electoral system in Lesotho. By introducing proportional representation, the Constitution perforce placed political parties at the centre of the electoral system, including questions related to election results. Instead, the court found comfort in the old jurisprudence which was based on the plurality electoral system used prior to the 2001 constitutional amendment. The court pedantically decided that 'both under the Constitution and under the supporting electoral legislation, a political party – the applicant being one – lacks *locus standi in judicio* to question the final allocation by IEC of PR seats' (ibid., para. 15). Consequently, the court declined jurisdiction. As the then SADC envoy and facilitator, Sir Ketumile Masire (2009), sarcastically noted, 'the court decided not to decide' the matter. Like all other

cases prior to it wherein the High Court literally declined to dispense substantial electoral justice, the decision plunged the country into the abyss of political instability that spanned almost the entire electoral term between 2007 and 2012.

The problem did not show any signs of abatement in the latter decision of the Court of Appeal of Lesotho in the case of *Basotho Democratic National Party (BDNP) v Independent Electoral Commission and Others* (2015). The case was an election petition in the aftermath of the 2015 snap election. The appellant was one of the political parties that had contested the 2015 general election in respect of both constituency and proportional representation seats. None of the candidates on its proportional representation list was allocated a seat. In calculating the 'quota of votes' under section 2 of Schedule 3 to the National Assembly Electoral Act of 2011, IEC did not include the 5 651 votes won by independent candidates who had not participated in the proportional representation election. The appellant contended that if those 5 651 votes had been taken into account it would then have been allocated one seat. Thus, it sought two orders in its petition. The first was to declare as irregular, null and void the legal notice declaring the elected members of parliament, for its omission of the appellant. The second directed the Independent Electoral Commission (IEC) to publish a fresh notice relating to the proportional representation seats which included the appellant as a party to which a proportional representation seat was allocated. Instead of being guided by the purposive interpretation, which is a norm in constitutional cases, the Court fell into pedantic legalism and decided that 'it is important to bear in mind that, as appears from the definition of 'political party' in section 2, that expression 'for the purpose of proportional representation elections includes an independent candidate'.

It was incorrect for an Act of Parliament which operationalises the mixed member proportional (MMP) electoral system to decree that for purposes of allocating proportional seats, a party include an independent candidate. In principle, proportional representation is for political parties, not independent candidates; and constituencies are theoretically for independent candidates. It is not the spirit of the Fourth Amendment to the Constitution to conflate these principles. Rather, the Amendment is very clear that the 40 proportional representation seats are allocated to political parties using the principle of proportionality applied in respect of the seats of the National Assembly as a whole ('Nyane 2017).

## CONCLUSION

The forgoing discussion demonstrates that ever since the return to electoral and constitutional democracy in 1993, the courts in Lesotho have generally been loath

to overturn election results. This approach has been, in most cases, not necessarily because the allegations made by petitioners were spurious, but rather because of the precedent of proceduralism that was established by the 1993 decisions of the High Court in the *BNP* and *Moupo Mathaba* cases. The precedent of these maiden cases still reverberates today in the jurisprudence of the superior courts in Lesotho on electoral disputes adjudication. As has been demonstrated by the 2002 decision in *Thebe Motebang case*, the High Court has used the technicalities of *locus standi in judicio* and jurisdiction as the predominant procedural bars to substantive electoral justice. This trend has recurred despite the fact that the High Court, which until 2011 when the finality clause was removed from the Constitution, has been the first and final court of disputed returns. Virtually all the election petitions since 1993, with the notable exception of the 2015 Court of Appeal decision in the *BDNP case*, have been hit by these procedural hurdles. Consequently, this pattern became the disincentive for aggrieved parties to trust the judiciary with their electoral disputes; so much that most litigants withdraw their petitions midstream after lodging them. To that effect, Shale (2008, p. 112) pointedly observes that:

A number of petitioners either withdrew or abandoned their cases. As a result, the cases have proven of little value to the development of electoral process. Why would petitioners seek to withdraw cases they filed so enthusiastically? Can it be true that losing parties institute cases as face-saving strategy or is the reason for the withdrawal diminishing hope and confidence in the judicial system?

In virtually all the elections since 1993, when the judiciary showed aversion to substantive electoral justice, the aggrieved parties resorted to extra-legal methods for ventilating their grievances. These methods range from, but are not limited to, parliamentary sit-ins, street protests, looting commercial establishments and stay-aways which ultimately put the country up for external intervention (Weisfelder 2015). The external intervention has not only been diplomatic but, at times, it has also been military (Likoti 2007).

Rather than indulging in undue pedantic legalism that has characterised election petitions, the superior courts in Lesotho have not really come to terms with the dictates of substantive justice in general and the doctrine of substantial effect in particular. Although the Constitution of Lesotho does not expressly embody substantive justice doctrine, the electoral statutes have unequivocally and persistently embraced the doctrine since 1993. However, the High Court has, almost invariably, misconstrued the thrust of this doctrine. Many a time, in its attempt to apply this doctrine, the court asks the wrong questions. The enquiry does not end with whether the returned candidate committed an

electoral malpractice or not; neither does it end with the finding that the alleged irregularity has not affected the result. Those are important in the inquiry, but they are not conclusive. According to the authority in *Morgan v Simpson* (1974), if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. The proven widespread violations of the electoral law in the 1993 election (according to *Moupo Mathaba case*) and 1998 election (according to Langa Commission) strongly militated against the validity of those elections.

Thus, two main recommendations may be made to reverse this trend. The first is to constitutionalise the doctrine of substantive justice outright. This may work in shifting the paradigm, a shift that has already been realised in Kenya. Prior to 2010, the problem of proceduralism in electoral disputes was rife and caused political disruptions of unprecedented proportions in Kenya (Azu 2015). The problem was ameliorated when they introduced their 2010 Constitution. In 2017, in an unprecedented decision in the *Raila Odinga case* (2017), the Supreme Court in Kenya did not only overturn the presidential election but it also revolutionised electoral jurisprudence as a whole. Lesotho may take a leaf out of this approach.

The second recommendation is that the electoral law may be improved to demonstrate explicitly that when confronted by an election petition the duty of the court is to dispense substantive electoral justice; the court must be inquisitorial rather than adversarial. This principle is already envisaged in the current electoral legislation, but it has not been realised. In fact, as early as 1993 the High Court of Lesotho demonstrated discomfort with the vague draughtsmanship of the principle in the electoral legislation. In the *Moupo Mathaba case*, the court candidly noted that '[t]he difficulty is apparent and I would respectfully refer the provisions of section 107 to the consideration of the Parliamentary Draftsman' (*ibid.*, pp. 419-420). Thus, this may be an opportune moment to re-visit the draughtsmanship of the electoral justice principles in the electoral law of Lesotho.

----- REFERENCES -----

- Azu, M 2015, 'Lessons from Ghana and Kenya on why presidential election petitions usually fail', *African Human Rights Law Journal*, vol. 15.
- Basotho Democratic National Party v The Independent Electoral Commission and Others* C of A (CIV) No.49/2015, available at <https://lesotholii.org/ls/judgment/court-appeal/16/8> (accessed on 1 September 2018)
- Basotho National Party v Principal Secretary of Ministry of Law, Parliamentary and Constitutional Affairs and Others* (CIV/APN/240/93), 1993, High Court, Maseru.

- Belengere, A et al. 2013, *The law of evidence in South Africa: basic principles*, Oxford University Press in Southern Africa, Cape Town.
- Douglas, JA 2013, 'Discouraging election contests', *University of Richmond Law Review*, vol. 47.
- Elklit, J 2002, 'Lesotho 2002: Africa's first MMP election', *Journal of African Elections*, vol. 1, no. 2.
- Elklit, J 2008, 'The 2007 general elections in Lesotho: abuse of the MMP System?', *Journal of African Elections*, vol. 7, no. 1.
- Great Britain 1983, *Representation of People Act 1983*, available at <http://www.legislation.gov.uk/ukpga/1983/2> (Accessed on 6 September 2018).
- Hawthorne L 2006, 'Legal tradition and the transformation of orthodox contract theory: the movement from formalism to realism', *Fundamina*, vol. 12, no. 2.
- Lesotho 1993, '*Moupo Mathaba and Others v Enoch Lehema and Others 1993-94*', *Lesotho Law Report and Legal Bulletin*, vol. 402.
- Hatchard, J 2015, 'Election petitions and the standard of proof', *Denning Law Journal*, vol. 27.
- Ishola, AS 2014, 'Finality jurisdiction of the High Court in local government election petitions in Kwara State of Nigeria: constitutional challenges', *The Nigerian Law Journal*, vol. 17, no. 2.
- Jack, M et al. (eds) 2011, *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament*, 24th ed., LexisNexis, London.
- Kaaba, O 2015, 'The challenges of adjudicating presidential election disputes in domestic courts in Africa', *African Human Rights Law Journal*, vol. 15.
- Kenya 2010, *The Constitution of Kenya*, Nairobi, Government Printer.
- Langa, P 1998, *Report of the Commission of Enquiry into the Conduct and Results of the Lesotho General Elections held in May 1998*, signed at Johannesburg on the 9<sup>th</sup> day of September 1998.
- Leon, RN 1998, *Report of the Commission of Inquiry into the Events Leading to Political Disturbances which Occurred in Lesotho during the Period between 1<sup>st</sup> July to 30<sup>th</sup> November 1998*, Available at <http://www.icla.up.ac.za> (accessed on 6 September 2018).
- Lesotho 1992, *National Assembly Election Order of 1992*.
- Lesotho 1993, *The Constitution of Lesotho of 1993*, [Government Printer, Maseru].
- Lesotho 1993, '*Moupo Mathaba and Others v Enoch Lehema and Others 1993-94*', *Lesotho Law Report and Legal Bulletin*, vol. 402.
- Lesotho 1998, *National Assembly Election (Amendment) Act of 1998*.
- Lesotho 1998, *Interim Political Authority Act of 1998*.
- Lesotho 2001, *Fourth Amendment to the Constitution Act, 2001*, [Government Printer, Maseru].
- Lesotho 2011, *Sixth Amendment to the Constitution of Lesotho*.
- Lesotho 2011, *National Assembly Electoral Act of 2011*.

- Likoti, JF 2007, 'The 1998 military intervention in Lesotho: SADC peace mission or resource war?', *International Peacekeeping*, vol. 14, no. 2.
- Macartney, WJA 1973, 'The Lesotho general election of 1970', *Government and Opposition*, vol. 8, no. 4.
- Mahao, NL 1998, 'Electoral system and the legitimacy of presentation in a democracy', *Lesotho Law Journal*, vol. 10, no. 2.
- Marematlou Freedom Party (MFP) v The Independent Electoral Commission and Others* CIV/APN/116/07.
- Masire, K 2009, *Talking points*, Maseru Sun, Maseru.
- Matlosa, K 1997, 'The 1993 elections in Lesotho and the nature of the BCP victory', *African Journal of Political Science / Revue Africaine de Science Politique*, vol. 2, no. 1.
- Moeketsi Tsatsanyane and Others v Litsitso Sekamane and Others* CIV\APN\344\98, Available at <https://pocketlaw.africanlii.org/judgment/court-appeal/1998/93.html> (accessed on 6 Sep 2018).
- Morgan v Simpson* [1974] 3 All England Law Reports 722
- Mothibe, TH 1990, 'Lesotho: the rise and fall of military-monarchy power-sharing 1986–1990', *Africa Insight*, vol. 20, no. 4.
- National Independent Party (NIP) and Others v Manyeli and Others* No.1 of 2007, Available at <https://lesotholii.org/ls/judgment/high-court/2007/17> (Accessed 29 August 2018).
- National University of Lesotho v Motlatsi Thabane* C of A (CIV) No.3/2008). Available at: <https://lesotholii.org/node/3118> (accessed on 4 September 2018).
- Nelson Chamisa v Emerson Mnangagwa and Others* (CCZ 42/18), available at <https://zimlii.org/zw/judgment/constitutional-court-zimbabwe/2018/42> (accessed on 6 September 2018).
- Nkansah, LA 2016, 'Dispute resolution and electoral justice in Africa: the way forward', *Africa Development / Afrique et Développement*, vol. 41, no. 2.
- 'Nyane, H 2017, 'The never-ending story of law and electoral system in Lesotho', *Journal of Law, Society and Development*, vol. 4, no. 1.
- R (Woolas) v The Parliamentary Election Court*, [2010] EWHC 3169 (Admin). Available at [http://www.kalvinchapman.co.uk/assets/r-\(on-the-application-of-woolas\)-v-parliamentary-election-court-2010--ewhc-3169-\(admin\).pdf](http://www.kalvinchapman.co.uk/assets/r-(on-the-application-of-woolas)-v-parliamentary-election-court-2010--ewhc-3169-(admin).pdf) (accessed on 6 September 2018.)
- Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others*, Presidential Petition No 1 of 2017, available at <http://kenyalaw.org/caselaw/cases/view/140716/> (Accessed on 30 August 2018).
- Raila Amolo Odinga v Independent Electoral and Boundaries Commission and Others*, Presidential Petition No. 5 of 2013 <http://kenyalaw.org/caselaw/cases/view/87380/>ember 2018) (Accessed 30 August 2018).

- Sekatle, P 1995, 'Disputing electoral legitimacy: the BNP's challenge to the result', in R Southall & T Petlane(eds), *Democratisation and demilitarisation in Lesotho: the general election of 1993 and its aftermath*, Africa Institute of South Africa, Pretoria.
- Shale, S 2008, 'The challenge of political legitimacy posed by the 2007 general election', *Journal of African Elections*, vol. 7, no. 1.
- Shale, V. 2017, 'Political parties and instability in Lesotho' in M Thabane, (ed) *Towards an anatomy of political instability in Lesotho 1966-2016*, Morija Printing Works, Maseru.
- Southall R 1994, 'The 1993 Lesotho election', *Review of African Political Economy*, vol. 21, no. 59.
- Southall, R & Fox, R 1999, 'Lesotho's general election of 1998: rigged or de rigeur?', *The Journal of Modern African Studies*, vol. 37, no. 4.
- Southall R & Petlane, T (eds) 1995, *Democratisation and demilitarisation in Lesotho: the general election of 1993 and its aftermath*, Africa Institute of South Africa, Pretoria.
- Steven Kariuki v George Mike Wanjohi and Others Nairobi EP No. 24 of 2014.* available <http://kenyalaw.org/caselaw/cases/view/98651/> (Accessed on 4 September 2018).
- Thebe Motebang v The Returning Officer for the Constituency of Khafung CIV/PETITION/1/2002.*
- Weisfelder, R 1977, 'The Basotho monarchy' in R Lemarchand (ed), *African kingships in perspective: political change in modernisation in monarchical settings*, Frank Cass, London.
- Weisfelder, R 2015, 'Free elections and political instability in Lesotho', *Journal of African Elections*, vol. 14, no. 2.
- Zambia, 2016, *The Constitution of Zambia Act No 2 of 2016*, Government Printer, Lusaka.