

The Role of the Judiciary in the Resolution of Intra-Party Conflicts in Lesotho

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Abstract

Political parties play an integral role in modern democracies and are legitimate platforms of contestation for state power. Despite the vital role that political parties play in democratisation, they are often prone to internal disputes. Their internal processes, such as conferences, elections, decision-making and deployments, are often subject to contestation. Conflicts are inherent in political contestation in general and in political parties, in particular. Hence, political parties have several mechanisms for dispute resolution, one of which is the referral of disputes to the courts of law. The role of the courts in internal political party disputes is a double-edged sword. While a court provides an independent platform for resolving disputes, it lacks reconciliatory attributes. After court intervention, many political parties often break up into smaller parties or experience major defections. This phenomenon is more pronounced in Lesotho than elsewhere. Ever since the return to electoral democracy in 1993, the role of the courts in internal party disputes has increased phenomenally. However, instead of achieving cohesion and internal stability, political parties have experienced splits, exacerbated conflicts or significant defections after the referral of their internal disputes to the courts. This raises the question of whether the courts are the appropriate

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mechanism for resolving internal political conflicts. This article investigates this question.

Keywords: political parties, Lesotho, inter-party conflicts, courts of law, conflict resolution mechanisms

1. Introduction

Political parties are essential anchors of viable democracies as they, among other things, mobilise the electorate and recruit candidates to participate in elections. As grand places for the endogenous and exogenous contestation for political power, they are often prone to conflict (Ibrahim and Abubakar, 2015). Political party conflict can take two forms: intra-party and inter-party conflict. On the one hand, intra-party conflict is internal to a single political party. It involves members or structures of the same party. Inter-party conflict, on the other hand, involves two or more political parties. Both forms of political party conflict are common and often have the same potential to result in the most catastrophic consequences. The worst effects of political parties' conflicts can be the devastation of countries and political violence. Intra-party conflict often emanates from members' disagreements over many aspects of party management, such as, but not necessarily limited to, intra-party democracy, management and candidates' nomination and imposition (Aleyomi, 2013 in Ibrahim and Abubakar, 2015:117). If not properly managed, intra-party conflict often leads to the disintegration of parties, weakening of political parties and, ultimately, breakaway (Kukec, 2019; Momodu and Matudi, 2013). Hence, political parties employ several mechanisms to manage and resolve internal conflicts. Some mechanisms are internal and contained in party constitutions, while others are external and include litigation in a court of law.

Lesotho has experienced recurrent intra-party conflict since independence from Britain in 1966. Since 1993 when the country returned to electoral politics, it has seen an increased role of the courts in internal party strife with far-reaching consequences not only for political parties but also for the stability of the country (Shale, 2016). Most conflicts have occurred over leadership positions, thus leading to factionalism and splits (Shale and Matlosa, 2008). The entire post-1993 era is laden with political party splits and defections instigated by disputes that were referred to the courts. In most cases, the disputes that were referred to courts of law invariably resulted in defections, breakaways and, in some instances, tumult for the country.

This raises the question of whether the courts are the best means of resolving internal political party conflicts. This article examines the efficacy of the courts as a mechanism for resolving internal party conflicts. It is based on secondary data collected from decided cases, books, journal articles, reports and newspapers. These sources provide the best data for analysis suited to the purpose of this article. The article comprises four main sections. The first section is the conceptual framework, which deals with the key conceptual levers. The second section examines the conflict resolution mechanisms available to political parties in Lesotho. The third section examines the judiciary as a conflict resolution mechanism in Lesotho and analyses the approaches used by the courts in Lesotho in a number of cases where breakaways followed the courts' decisions. Lastly, a conclusion with recommendations is provided.

2. Conceptual framework

2.1 Party systems

Like political parties everywhere, political parties in Lesotho operate within a particular typology of party system. A political party system involves frameworks and structures within which political parties compete and cooperate in a specific jurisdiction. The four main factors in determining the typology of political parties systems are "(a) the number of political parties, (b) the absolute and (c) relative size of the two largest and (d) the relative size of the second and third largest parties" (Croissant and Volkel, 2012:239). The typology of political party systems in Africa is a subject of great controversy (Bogaards, 2004). This is because African political party systems often have intricate nuances that defy generalised typologies largely informed by Eurocentric party systems. Bogaards captures the situation of party typologies in Africa rather astutely: "[m]ulti-party elections do not lead automatically to multiparty systems. In sub-Saharan Africa, the spread of multiparty politics in the 1990s has given rise to dominant parties. A majority of African states have enjoyed multiparty elections, but no change in government" (Bogaards, 2004:173). Within the African context, three broad categories of party systems exist: predominant or dominant, multiparty or pulverised and single-party systems (Alan, 2003). A political party system is predominant when one party "gains an absolute majority of seats in parliament" (Erdmann and Basedau, 2008:243). In Africa, countries such as South Africa, Zimbabwe and Botswana are prime examples of this predominant party system. Although a predominant system may be open to and

practice multi-partyism, a single political party emphatically dominates the landscape. The second category is a non-dominant or pulverised system. This system has a constellation of political parties with no dominant political party. According to Ranny and Kendall (1954), this is a system in which three or more political parties have shared the majority of the votes and public office such that coalition governments have ruled the country. The third is a single-party system. This typology has effectively been wiped off by the wave of democratisation in Africa since the 1990s (Bogaards, 2004). There are outliers in Africa where political parties are prohibited, such as in Eswatini. Eswatini is the region's pariah as it is the only country in southern Africa without multi-party elections.

The political party system in Lesotho has been in constant change. From 1993, when the country returned to electoral politics, until 2012, when the country started a turbulent era of coalition politics, the party system in Lesotho was characterised by two dominant parties: Basotuland Congress Party (BCP) (1993–1997) and Lesotho Congress for Democracy (LCD) (1997–2012). Since 2012, no single party has commanded an absolute majority, thereby rendering the system largely pulverised. An intriguing dynamic of this period is that two main political parties – All Basotho Convention (ABC) and Democratic Congress (DC) – took turns as the main political party in the country, albeit without an absolute majority. This pattern was disrupted by the formation of the Revolution for Prosperity (RFP) in the run-up to the 2022 elections. The RFP won the most votes in the 2022 elections and, consequently, the most seats in parliament. However, the party could not get absolute votes which led to the formation of a coalition government.

2.2 Intra-party conflicts

As platforms of contestation for power, political parties are always prone to internal and external conflict. Conflict within political parties is referred to as intra-party conflict (Awofeso and Ogunmilade, 2017). Intra-party conflict is a multidimensional and dynamic phenomenon (Gherghina, Close and Kopecky, 2019). It connotes a situation of disagreement due to incompatibility and strife within the party system and implies a situation characterised by disagreements, disputes and physical hostility within the party (Obi, 2018). Intra-party conflict is persistent and occurs in different ways and at different points in the process of democratisation (Ibrahim and Abubaka, 2015). It characterises political

party life and occurs regularly within and between the different units of the party organisation. Invariably, it is caused by, among other things, the diversity in the composition of the party members, disagreements that occur at party conferences regarding the nature of the party platform or leadership selection, divergence in voting behaviour by party representatives in the legislature, and disputes between the party's parliamentary caucus and representatives in the cabinet (Gherghina, Close and Kopecky, 1999). It may also result from the lack of intra-party democracy and methods and procedures for including members in decision-making (Aleyomi, 2013). For instance, intra-party conflict often occurs during the nomination and selection of candidates, elections for leadership positions, ordinary membership conventions and during the application of internal rules to discipline party members and hold the leaders of political parties accountable (Awofeso and Ogunmilade, 2017). In the same vein, Ibrahim and Abubakar (2015) point out that intra-party conflict happens when members pursue contradictory goals, particularly in the fielding of candidates for both elected and appointed positions. Likewise, Anjorin and Danladi (2021) state that intra-party conflict is inevitable because, although members pursue the common goal of ruling a country and influencing public policy, they also hold conflicting views, interests, thoughts and principles. Although the causes of intra-party conflict are numerous, the most common trigger is the nomination and selection of candidates for elections and leadership positions.

2.3 Conflict resolution mechanisms

Conflict resolution is the process of ending disputes and removing the factors identified as causes or triggers of the conflict to achieve peace and harmony among the conflicting parties (Nnaemeka, 2019). Conflict resolution is intended to reduce, eliminate or terminate conflict (Rahim, 2002). To minimise the negative effects of conflict, political parties employ a wide range of mechanisms. These mechanisms can be divided into proactive and reactive methods. Proactive methods focus on the prevention of conflict while reactive methods refer to the responses to the occurrence of conflict (Nnaemeka, 2019). Proactive methods include good governance, trust and confidence building, intra-party democracy and communication. In contrast, reactive methods include mediation, negotiation, conciliation, arbitration, mini-trials and litigation (Nnaemeka, 2019).

Negotiation systems encourage and facilitate cooperation between parties to a dispute. Negotiation involves communication between the disputants to reach an understanding that would benefit both parties. It does not involve a third party (Obi, 2018). In cases where the negotiation fails, those in dispute engage a third party to act as a mediator. Mediation is a special form of negotiation. The mediator is not directly involved in the conflict but becomes a negotiating partner (Kotzé, 2002). Conciliation involves a third party, namely a conciliator, who facilitates the settlement of conflicts following consensus from those in dispute. The conciliator assists the conflicting parties to identify and address the causes of the conflict. The conciliator also encourages voluntary participation and discussion in an effort to ensure conflict resolution (Nnaemeka, 2019).

Often when internal measures fail to resolve intra-party conflicts, parties resort to external mechanisms such as litigation. Litigation refers to a process in which complainants escalate their dissatisfaction to a court of law (Obi, 2018). The courts have several approaches to resolving intra-party conflicts: the amicable settlement approach, the contractarian approach and the zero-sum approach. The amicable settlement approach may take two forms. First, the court may allow parties to reach a settlement on their own and return to the court for such a settlement to be made a court order. Second, after assessing the totality of the circumstances of the dispute, the court may send the parties back to attempt to settle the dispute amicably (*Ntsu Mokhehle v Molapo Qhobela and Others*, 1997). The advantage of the amicable approach is that, like the Alternative Dispute Resolution (ADR) mechanisms, which involve negotiation, conciliation and arbitration, parties are given a second opportunity to reflect on their dispute after realising that if they do not settle their disputes, a third party – the court – will settle it for them with an unpredictable outcome. The disadvantage is that disputants in general, and those within political parties in particular, rarely change their hard-line positions. Therefore, referring the resolution of the dispute back to them is either a waste of time or worsens the dispute (*Ntsu Mokhehle v Molapo Qhobela and Others*, 1997).

The contractarian approach treats the constitutive instruments – constitutions, rules and guidelines – of political parties as contracts that members enter into voluntarily (*Ramakatsa and Others v Magashule and Others*, 2012). In terms of this approach, courts are often reluctant to tamper with the decisions of political parties even when they appear

ostensibly unfair, as long as they were made in accordance with the provisions of the constitution of the party. Courts normally interpret the constitutions of political parties with a view to giving them effect.

Sometimes, the courts do not apply the amicable approach to internal political party disputes. Instead, they use the adversarial zero-sum approach. In this approach, the courts stick strictly to legal procedures and the evidence placed before them. The court decides where one party is the winner and the other is the loser. In most cases, litigants expect this when they refer their disputes to the courts. However, this is the most divisive approach as far as the internal disputes of political parties are concerned. As always observed in the scholarship, this approach is an example of the fact that the courts are ill-suited to resolving political disputes, in general, and internal political disputes, in particular. After the courts make their decisions, political parties often split or experience major defections. Litigation invariably leaves political parties “without internal cohesion, damaged interpersonal relationships, financially drained litigants, suspicion and distrust” (Obi, 2018:29).

3. Intra-party conflict resolution mechanisms

3.1 Constitutions of political parties

Political parties are constituted in terms of their constitutive instruments: constitutions, rules or statutes. Hence, political party constitutions are vital as they are “the terrain upon which confrontations, negotiations, and power games with other organisational actors will take place” (Panebianco, 1988: 33– 36). Hence, any analysis of the conflict resolution infrastructure within political parties must always start with an investigation of the provisions of the constitution on the subject. Besides, most challenges for political parties – from a lack of clarity on the party’s ideology to poor organisational structure in areas such as gender parity and conflict resolution – emanate from the constitutional design. Lesotho’s political parties are no exception; their constitutions have conflict resolution mechanisms. Intriguingly, political parties have strikingly similar constitutional designs. This, in a way, is attributable to the historical fact that they are virtually the offshoots of one political party – the BCP (Likoti, 2005; Matlosa and Sello, 2005). As Likoti observes, “all these parties have a similar ideology and are fragments of one main political party, the BCP. [They have] a shared origin, history and similar ideological outlook” (2021:162). In respect of conflict management and

resolution, the party constitutions in Lesotho have three prominent features.

The first feature is that conflict resolution is embedded in their structural hierarchies. Unlike disciplinary structures appointed as structures from the mainstream hierarchical structures, conflicts within parties are handled by the same structures that run the parties – the structures that ordinarily manage the party are also expected to act as mechanisms of conflict management and conflict resolution. The constitution of the All Basotho Convention (ABC), one breakaway party of the BCP lineage, is a case in point. It provides for a four-layered dispute resolution mechanism: branch committee level, constituency committee level, national executive committee level and national conference level. In terms of clause O of the party's constitution, a dispute in the political party must first be referred to the branch committee. If the complainant is dissatisfied with the decision of the branch committee, the decision may be referred to the constituency committee. If the dispute is not resolved at the constituency level, it is referred to the national executive committee, and the national conference is the final appellate forum. The constitution provides that the decision of the national conference is binding and final. This mode of embedding conflict management and resolution within the party's structures is problematic. Disputes often concern party positions, which means that internal hierarchical party structures are invariably conflicted and is the reason their decisions are never accepted as fair and impartial. This is what transpired in 2019 when the courts in Lesotho – both the High Court and the Court of Appeal – were seized with a dispute over the nomination of candidates in the run-up to the national executive committee election scheduled for February 2019 (*Korokoro Constituency Committee v Executive Working Committee – All Basotho Convention*, 2019).

In the build-up to the conference, the leader of the ABC, Tom Thabane, had already stated that he would not accept the nomination of Nqosa Mahao. Nevertheless, his home constituency nominated him as a candidate for the position. Not entirely unexpectedly, the National Executive Committee (NEC) rejected that nomination and the Executive Working Committee (EWC) went on to suspend the Korokoro Constituency Committee's membership in the ABC. The constituency committee challenged the decision of the EWC in the courts. While the High Court dismissed the application, the Court of Appeal ruled in favour of the Korokoro constituency, and Mahao was allowed to participate as a

candidate for the position of deputy leader at the conference. The conference indeed elected him as deputy leader. The leader never endorsed the committee elected at the conference, which included Mahao. The conflict between the leader and his newly elected deputy, Mahao, continued until Mahao defected in April 2021 to form a breakaway party, the Basotho Action Party (BAP). This ABC spectacle demonstrates how the model of entrusting the party hierarchy with conflict resolution has fundamental limitations. The ABC's approach of entrusting the party hierarchy with conflict resolution is not unique. The constitutions of the Democratic Congress (DC) and the Alliance of Democrats (AD), albeit in varying forms, also entrust the party structures with the responsibility of managing and resolving internal party conflicts.

The second feature of constitutions in Lesotho is that, despite the inherent limitations of the internal conflict management and resolution architecture, they do not expect members to appeal or to refer their grievances to the courts. Therefore, they include ouster clauses in their constitutions. Ouster clauses preclude the involvement of the courts after a certain decision has been made. Such a decision is regarded as final and binding (Edlin, 2009). Political parties enforce these clauses by automatically terminating the membership of any member who refers an internal party dispute to the courts. While the ABC's constitution is not unique in using an ouster clause, its constitution is a prime example. Clause 5(e) of the ABC's constitution provides for an ouster clause thus:

Members must try to resolve their disputes by using internal party structures. Any member or group of members that refers their disputes to the courts of law before exhausting processes provided by Article O of the Constitution will be deemed to have violated discipline and will automatically be taken to deprive himself of membership rights in the party (translated from the vernacular).

Ouster clauses are prevalent in the constitutions of political parties in Lesotho and internationally. For instance, Rule 2.7.1 of the constitution of the African National Congress (ANC) in South Africa provides that "a decision of the NDRC [National Dispute Resolution Committee] Appeal Committee shall be final and binding on the parties, and neither party shall have any further recourse to a court of law or other structure or office of the ANC" (ANC, 2017). Ouster clauses have always been highly controversial as they deprive members of political parties of the right to access the courts, which is a right provided by the country's constitution.

After a long period of uncertainty about whether ouster clauses conflicted with the constitution, the Court of Appeal of Lesotho had the opportunity to decide on their constitutionality in *Korokoro Constituency Committee v Executive Working Committee – All Basotho Convention* (2019). Among the many issues that had to be decided by the courts was the constitutionality of the ouster clause embodied in clause 5(e) of the party's constitution. The Court of Appeal was unequivocal in its finding of the clause as unconstitutional. The court held that, "clause 5(e) of the ABC constitution is constitutionally unconscionable when measured against the constitutional standards of access to justice and right to a fair trial contemplated by section 12(8) of the Constitution of Lesotho" (para 84). The court identified four grounds on which it found the ouster clause unconstitutional. The first ground was that it took away a constitutionally entrenched right to have one's disputes resolved by an impartial court. The party structures were clearly conflicted. Second, the court found that even if the clause was to be regarded as a limitation on the right, "it is not clear what this kind of clause serves [a] legitimate purpose in a democratic society" (para 86). Third, the court found that the clause was one-sided, favouring the party hierarchy against the members. Therefore, it was unfair as "the prejudice that the clause visits on aggrieved litigating members is disproportionate to the conceivable benefits that it confers on the party" (para 86). Fourth, the court said the clause seemed to be enforceable against the members regardless of the fact that it was unfair. The court criticised the clause as follows: "in other words, the clause may be enforced however unfair or unjust its consequences may be. In my view, there are no common law defences which could render the clause flexible. In my view, the clause means what it says" (para 86).

3.2 The electoral law

Political parties in Lesotho are registered under two legal regimes: the Societies Act of 1966 and the National Assembly Electoral Act of 2011. They are registered under the Societies Act as legal entities that may acquire rights and duties, with the capacity to sue or be sued. Such registration is not enough to allow them to contest elections under the auspices of the Independent Electoral Commission (IEC). Therefore, they are required to further register with the IEC to contest elections and to gain all the benefits that come with such registration, such as election campaign funding and political party funding. Both pieces of legislation do not permit intervention by either the Registrar of Societies or the IEC

in the internal affairs of political parties in general and conflict resolution in particular. Section 23 of the National Assembly Electoral Act requires all political parties intending to contest an election to register with the IEC. Section 24 of the same Act provides for the myriad of requirements for registration of a political party, including the contents of political parties' constitutions. While the section imposes certain minimum standards of good internal governance, such as management of finance, non-discrimination, gender equality and inclusivity, it does not impose any minimum standards on managing or resolving internal party conflict. Neither does the section provide for the IEC having any role in internal party conflict. Hence, it may be said that the electoral law is based on the principle of non-interference in the internal affairs of political parties. This principle is based on the reality that the IEC should approach its interaction with political parties with extreme caution because its principal mandate is to manage elections, not political parties. Therefore, it must appear independent and impartial to all players at all material times.

3.3 The judiciary as a conflict resolution mechanism

The involvement of the courts in internal political affairs is a very controversial, if not complex, subject. However, the courts of law in Lesotho have been seized with internal political party disputes for a long time. The involvement of the courts in internal political party disputes is a contentious subject because it is a double-edged sword. Courts everywhere enjoy the reputation of bringing expertise, independence and impartiality to bear on resolving any disputes. The final resort to the courts is also based on the fact that every individual has certain inalienable rights regardless of affiliation. These rights, among other rights, include access to the courts and equality before the law enshrined in national constitutions. On the one hand, the courts are often viewed as the best forum for the referral of political conflicts. On the other hand, the courts are often touted as not being the best arbiters of political disputes because their approach to dispute resolution is often adversarial, zero-sum and therefore destructive to internal party cohesion (Obi, 2018). This last part is vindicated by the continual post-litigation splintering of political parties in Lesotho.

The courts in Lesotho have adopted several approaches to resolving internal political disputes in Lesotho. These approaches may be classified

in three ways: the amicable settlement approach, the contractarian approach and the zero-sum approach. Despite variations in each approach, almost all of the approaches have resulted in major splits within political parties or the defection of individual members, as will become clear in the discussion that follows.

3.3.1 The amicable settlement approach

Although the courts are renowned for their adversarial approach to dispute resolution, they sometimes resort to the amicable resolution of disputes. This approach has been invoked occasionally with regard to political parties' internal disputes. The amicable approach was adopted by Justice Mofolo of the High Court of Lesotho in the *Mokhotlong Constituency Committee of Basutoland Congress Party and Others v Mosisili and Others* (1996). This dispute culminated in the splintering of the then-ruling BCP after long and gruelling internal rancour. The then prime minister and leader of the party, Ntsu Mokhehle, finally left the BCP and formed the LCD in 1997, which immediately became the government because it had the majority of members in the National Assembly. This move was unprecedented and sent shock waves through the national and international community.

The facts of this case can be noted briefly as follows: Four constituencies affiliated to the BCP had approached the High Court seeking to nullify the outcome of an elective conference held from 8 to 11 March 1996. The basis of their complaint was that irregularities had marred the conference. The court found that irregularities had marred the conference but, rather bizarrely, ordered that "the entire proceedings of the BCP Conference of 8 – 11 March 1996 be referred to the leader of the BCP Dr Ntsu Mokhehle for amicable settlement" (para 133). The court's rationale for referring the dispute back to the leader for amicable settlement was cast thus:

Evidence was confused as on whom, after the elections, power fell. As there was no evidence of the outgoing committee having handed over to the incoming committee moreover as it was established by evidence that there were two rival groups within the BCP with no group willing to yield to the other, and moreover as it was established by evidence which this court believed that members of the Elections Committee at the March 1996 conference belonged to the rival groups, and more importantly as it

was not established by evidence that the leader of the BCP Dr Ntsu Mokhehle belongs to any of the rival factions ... (para 33).

The court directed that such an amicable settlement had to be completed within 14 days from the date of judgement with the possibility of an extension, which could not extend beyond 30 days. The court stated that, should the amicable settlement not be proceeded on within the stipulated time or such extension of time as may have been granted by the court, or if any of the parties wished to approach the court for any reason, a party wishing to do so could set the matter down to have such questions determined by the court (para 134). Not entirely unexpectedly, the approach did not work, and the parties returned to the court, where the court ordered that a new conference be organised (*Mosisili and Others v Mokhehle and Others*, 1997). The last court-ordered conference was held in February 1997. The conference was held amid an already soured relationship between the executive committee and the party's leader. As expected, the delegates of the conference organised by the leader's rivals staged a vote of no confidence in the leader and purportedly removed him from his position. The leader approached the High Court again for an order nullifying his removal (*Ntsu Mokhehle v Molapo Qhobela and Others*, 1997). The court decided that the removal of the leader was invalid because it was not on the agenda. However, it was decided that Ntsu Mokhehle's term as the leader of the BCP had expired in January 1997, and he would remain the interim leader while a new conference was organised to elect the leader. Since the relationship between the then leader and the executive committee had already broken down irretrievably, the leader defected from the BCP and announced the formation of a new party, the LCD.

This case demonstrates the way in which the court had entirely misread the conflict situation within the BCP and started by improperly applying the amicable settlement approach. The internal conflict in the BCP had a long history and had always orbited the leader. Suggesting that the leader, who was at the centre of the conflict, should preside over an attempt to find an amicable solution to the problem was a recipe for disaster.

3.3.2 The contractarian approach

The contractarian approach is not unique to Lesotho; it is a common approach in disputes concerning the interpretation of political party constitutions. For instance, the Constitutional Court of South Africa

reiterated this time-honoured principle in *Ramakatsa and Others v Magashule and Others* (2012). The case concerned the internal disputes within the ANC in the Free State province. The applicants sought to set aside as invalid the Free State provincial conference of the ANC and all its outcomes on the grounds that there were irregularities in many of the branch meetings that elected delegates to the provincial conference. The applicants claimed that their rights under the constitution of the party had been breached. The court agreed and consequently declared the conference, its decisions and its resolutions unlawful and invalid. In espousing the contractarian approach, the court stated that the ANC was a voluntary association as it had been established by agreement – the ANC's constitution. It was not a body established by statute. The ANC's constitution constitutes “the terms of the agreement entered into by its members. Thus the relationship between the party and its members is contractual. It is taken to be a unique contract” (para 79).

The superior courts in Lesotho often apply the contractarian approach. For instance, the approach was adopted in the High Court's recent decision in *Cekwane and Others v Basotho National Party and Others* (2020). The dispute arose during the run-up to the Basotho National Party (BNP) elective conference in July 2019. The applicants argued that, among other things, the nomination of candidates as constituency committee members of the BNP for Qacha's Nek, Qoaling, Qhalasi and Mafeteng should be reviewed and set aside, and fresh constituency elections should be held. The court agreed. The court invoked the contractarian principle and rejected the argument that members did not have the standing to sue the party. The court held that as members of the party they were inherently qualified to sue the party “through its structures where they entertain a founded conviction that it has either by conduct or omission violated its constitution. Their right and authority to do so originates from a supportive legal reality that a constitution of political party is actually a *sui generis* contract” (para 18).

It was common cause that, although the party did not experience a split as such, it experienced a major defection when its member in parliament, Mr Joang Molapo, defected (The Post, 2020). Molapo had contested the position of leader of the party, which he lost to the incumbent leader, Machesetsa Mofomobe. This outcome reveals that the simmering conflicts within the party were never resolved by referring the disputes to the court. Although party members often exalt their constitutions,

overreliance on the contractarian approach always has its own risks. Party constitutions often have deficiencies, such as ambiguity, dictatorship and unfairness (*Korokoro Constituency Committee v Executive Working Committee – All Basotho Convention*, 2019). Hence, if the courts disregard these inherent causes of conflict in resolving internal party conflicts, this does not help conflict but only exacerbates it.

The most recent incident is the case of Revolution for Prosperity (RFP), a new political party formed a few months ahead of the 2022 general elections. The RFP introduced a unique and controversial selection method for its candidates for the 2022 elections. The method had two stages in the selection process: popular election and a ‘merit-based selection’ by the party's National Executive Committee. The four best performers in the primary elections were subjected to the so-called interviews, the outcome of which was to be approved by the party's leadership (Letsie, 2023). The outcome of the interview process was that some hopefuls who had won the popular vote during the primary elections were not endorsed as party candidates; those who ‘performed well’ at the interview were endorsed as candidates even though some did not win the popular vote. The process and its outcomes generated much controversy, and some losers dragged the RFP to the courts of law (*Ralentsoe v Toloane*, 2022). The applicants complained that the decision of the Executive Committee not to endorse them despite being elected by popular vote violated Article 9 of the RFP Constitution. The article provides that members have a right to participate in the party's affairs. The court agreed with the applicants that the Executive Committee did not have the power to deprive the elected candidates of their right to contest elections as RFP's candidates at the election. The court ruled that: “[i]t is declared that the applicant's constitutional right to participate in the affairs of the party (RFP) and the right to participate in the national elections on behalf of the party in terms of Article 9 of the party Constitution has been violated by the party” (para 54).

As a result, the popular candidates were allowed through the court order to stand for the party against the will of the party leadership. This became the source of protracted internal party strife. Even though the party did not immediately experience visible cracks after the court case, some fractures started showing a few months after the elections. Even after the elections, the members who represented the party and were elected based on the order were viewed mainly as ‘rebels’. The fissures between these

members of parliament and the party continued to widen until they, on one occasion, voted against the party line and openly criticised and opposed government policy (The Post, 2023a). The crescendo of this conflict was the disciplinary process against, and the resultant suspension of, three members (Mahali Phamotse, Thuso Makhwanyane and Rethabile Letlailana) from the party for six years (The Post, 2023b). The spectacle is unending as the suspended members returned to court to challenge the suspension (Lesotho Times, 2023). The conflict that is crippling the RFP has far-reaching implications for the stability of the RFP-led coalition government, the performance of the party in the succeeding elections and, as is the pattern with all leading political parties that came before the party, has the potential to harm the party's political dominance.

3.3.3 The zero-sum approach

While Lesotho's contemporary political history is replete with court-instigated party defections and breakaways, four major incidents demonstrate how the zero-sum approach has invariably failed to manage internal party conflicts. The first incident occurred during the transitional period when the country was transitioning from a military junta to a democracy. The first democratic elections were scheduled for 1993. With a view to contesting the elections as a united body, the belligerent factions struck a short-lived truce. The BCP organised an elective conference in January 1992, the first conference to elect the executive committee since 1969 (Sekatle, 1997). Prominent party members Gerard Ramoreboli, Phoka Chaolana and Khauta Khasu, who had been engaged in continuing disagreements with the leader, Ntsu Mokhehle, challenged the outcome of the conference in the High Court (Pule, 1999). The challenge was unsuccessful, and they broke away from the BCP to form a new political party, the Hareeng Basotho Party (HBP).

The second significant incident was the formation of the LCD in 1997. Following a protracted conflict within the BCP, the High Court attempted a hybrid approach – combining the amicable settlement and zero-sum methods. In the first case of *Mokhotlong Constituency Committee of Basutoland Congress Party and Others v Mosisili and Others* (1996), the court adopted an amicable approach but failed to resolve the conflict. Several other applications and counter-applications ensued, but all were in vain. In the last case, *Ntsu Mokhehle v Molapo Qhobela and Others* (1997), the court adopted the zero-sum approach and declared as

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unlawful the removal of the then BCP leader, Ntsu Mokhehle. However, the court made a further adverse finding that Mokhehle's term as a leader had long expired and he would therefore be an "interim leader" until a new leader was elected. This finding, coupled with the already deep fissures between him and the executive committee, led Mokhehle to announce that he was forming a new political party, the LCD.

The third court-instigated defection was that of the deputy leader of the ABC, Tlali Khasu, in 2017, after losing a court battle over his 90-day suspension from taking part in the ABC executive committee's activities. Khasu challenged his suspension in the High Court, where he lost; he appealed to the Court of Appeal, where he lost again (*Khasu v Thabane and Others* 2016). After losing the court case, he decided to defect from the ABC and announced the formation of his new breakaway party, the True Reconciliation Unity (TRU), in January 2017 (Lesotho Times, 2017).

The fourth major court-instigated breakaway was the formation of the Alliance of Democrats (AD), a splinter party of the Democratic Congress (DC). The leader of the DC, Pakalitha Mosisili, and his deputy, Monyane Moleleki, had been in conflict for some time. In November 2016, the executive committee made some drastic and dramatic decisions. It purportedly suspended Mosisili from the executive committee. Thereafter, it appointed Moleleki as the acting leader, withdrew the DC from a seven-party ruling coalition and announced a coalition agreement for a government of national unity with the then-opposition party, the ABC (Lesotho Times, 2016). Mosisili responded by calling the party's special conference to discipline what he called "rebels" of the executive committee. Moleleki sought to block the conference by launching a High Court application, and Mosisili launched an application challenging his suspension (Lesotho Times, 2016). The High Court consolidated and heard the two cases together, and Moleleki lost the court bid. After that, the special conference suspended Moleleki and nine other members of the party's National Executive Committee for six years. Moleleki viewed the measure as political banishment and decided to form a new party, the AD. The consequences of his defection were far-reaching and even affected the

country. The prime minister lost a vote of no confidence in parliament and responded by calling for an early election in 2017.

4. Conclusions and recommendations

This paper investigated the role that the courts in Lesotho have played in resolving internal party disputes. It analysed the major splits in the post-1993 history of Lesotho. Invariably, it is evident that most major splits resulted from unresolved internal party disputes. These disputes were referred to the courts of law for resolution. The courts tried several methods to resolve party disputes: amicable, contractarian and zero-sum. In some instances, the courts even tried hybridised methods, as in the case of the internal BCP conflicts that culminated in the formation of the LCD in 1997 (Pule, 1999; Sekatle, 1997; Sekatle, 1999). Nevertheless, the conflicts have resulted in splits and defections. This shows that the courts, using their conventional methods, are not the correct forum for resolving internal party conflicts.

Because of the adversarial and win-lose nature of the courts' approach, the courts' decisions leave the parties in conflict feeling mistrustful. Another key finding is that the legal framework for resolving internal political party disputes is inefficient. Political parties' constitutions often do not provide for a fair dispute resolution framework within the party. Most of the constitutions entrust the party hierarchy with dispute resolution. The problem with this approach is that it lacks fairness and expertise. As demonstrated in the case of the ABC, as the Court of Appeal observed, the ouster clause in the party's constitution largely serves to protect party executives from scrutiny by the general membership. The party executives, as decision-makers, are inherently conflicted. Thus, it violates the rules of natural justice when the person interested in the outcome of the dispute resolution process becomes the sole and final arbiter. The statutory framework for the registration of political parties – the Societies Act of 1966 and the National Assembly Electoral Act of 2011 – does not help

either. These two pieces of legislation do not allow the Registrar of Societies or the IEC to assist in internal party disputes.

Since courts of law are an ill-suited mechanism for resolving internal party conflicts, it is recommended that the Alternative Dispute Resolution (ADR) framework be instituted for political parties. The ADR framework should be mandated by legislation and be operationalised by party constitutions and rules. The law should not preclude courts of law from resolving internal party disputes as that may be unconstitutional, but the ADR process should mandatorily precede a court's intervention in the internal affairs of political parties. The institutionalisation of the ADR will go a long way towards stabilising democracy in general and the political party system in particular.

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