

IN THE HIGH COURT OF LESOTHO

In the Application of :

KHOTSO MOEKETSI

Applicant

and

COMMISSIONER OF POLICE
SOLICITOR GENERAL

1st Respondent
2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 7th day of November, 1983.

On 20th September, 1983, applicant filed with the Registrar of this Court an urgent application in which he sought an order couched in the following terms:

- "1. That Rule Nisi be issued and returnable on the date and time this Honourable Court may so order, calling upon the Respondents to show cause (if any) why:
 - (a) First Respondent shall not be interdicted from deporting or otherwise removing the person of one Khotso Moeketsi from the Kingdom of Lesotho.
 - (b) First Respondent shall not be restrained from assaulting one 'Maneo Moeketsi, the wife of the Applicant;
 - (c) First Respondent shall not be restrained from ransacking the house of the Applicant with guns at night times;
 - (d) First and Second Respondents shall not pay costs of this application.
2. That prayer 1(a) should operate as an immediate interim interdict."

2/ The application

The application was on 21st September, 1983 placed before Kheola, A.J. who granted the Rule Nisi returnable on 10th October, 1983. After a number of postponements the application was finally argued before me on 31st October, 1983.

Applicant's founding affidavit disclosed that he was born on 8th September, 1948 at Ts'akholo in the district of Mafeteng. He now lives at Lithabaneng in the district of Maseru where he has built himself a house

In 1978 he was convicted of a crime and sentenced to six (6) years imprisonment. After serving four (4) years of his term of imprisonment at the Central Prison in Maseru, he was, on 11th March, 1982 released on parole. On the day of his release, police officers came to the Central Prison and threatened to deport and remove him from Lesotho.

In June 1983 the police arrested and detained him allegedly under Internal Security Legislation. During his detention, he was again informed by the police that he was to be deported from Lesotho to the Republic of South Africa. Indeed, he now has information which he verily believes that a deportation order to remove him from Lesotho to the Republic of South Africa has been or will soon be or is about to be issued against him. No reasons have been disclosed for his deportation but even if it were believed that he might have committed a criminal offence in the Republic of South Africa, Lesotho has no extradition arrangements with the Republic of South Africa. By virtue of his birth he is a citizen of Lesotho and has never denounced his citizenship. Neither the police nor anyone else for that matter have legal right to deport him from his mother country, Lesotho.

Wherefore applicant prayed for an order as aforesaid.

Supporting affidavits were filed by 'Mantai Monaheng (born Mahase) and 'Maneo Moeketsi. In her affidavit,

3/ 'Mantai Monaheng

'Mantai Monaheng deposed that her maiden home was at Ts'akholo in the district of Mafeteng. On 8th September 1948 and prior to her marriage, she gave birth to applicant who is her illegitimate child and has, therefore, known him from birth. When she later got married to the family of Monaheng, applicant remained at her maiden home at Ts'akholo and assumed the surname of Moeketsi which is used interchangeably with her maiden surname, Mahase

For his primary education, applicant attended school at Kroonstad and Bloemfontein in the Republic of South Africa. He later worked for a while in Bloemfontein before returning to Lesotho when he settled at Lithabaneng in the district of Maseru. By virtue of his birth, applicant was, therefore, a citizen of Lesotho and to the best of her knowledge he had never relinquished his Lesotho citizenship.

The affidavit of 'Maneo Moeketsi was to the effect that she was legally married to applicant with whom she lives at Lithabaneng in the district of Maseru.

At about 3 or 4 O'clock in the early morning of 20th September, 1983, applicant was still in their house at Lithabaneng when the police came looking for him. Applicant hid himself under the bed while she told the police that he was not in. The police ransacked the house but could not see the applicant. When they left the house, the police met a visitor of the family who told them that applicant was still in the house. Applicant then came out from his hiding place with his hands raised up. The police fired three shots at him after which they told applicant to produce the gun he had had in possession when going to O.K. Bazaar. He told them he never had a gun. Applicant was then taken to Queen Elizabeth II hospital in a police vehicle. The deponent was handcuffed and taken to the charge office from where she was later released when she went to

4/ report what

- 1 -

report what had happened to their attorney

The application was opposed by the Respondents and the opposing affidavits were filed by D/Sgt Molise, Lt. 'Mabathoana, Mahase Letsa Mahase, Mokone Baffoe and Magdalena Mpuru

D/Sgt Molise deposed that he was the finger prints expert in Lesotho and had seven years continuous experience in the field. On 10th August, 1983 and on the instructions of the Chief of the C.I.D., Lt. Col. Motsoari, he compared the finger prints kept in their office, concerning one Khotso Moeketsi (applicant), in E.P. No. 2034/78 in L M.P. 35 with the finger prints of one Khotso Moeketsi alias Gabriel Mpuru provided by the South African Police on Form S A.P 197 (annexed). He was satisfied beyond doubt that all the prints were of one and the same person

on

Lt. 'Mabathoana deposed that/29th September, 1983, he proceeded to the Republic of South Africa to conduct investigations into the applicant's true nationality. In Ladybrand in the Republic of South Africa, he got the assistance of the South African Police, one of whom accompanied him to Thaba Nchu. At Thaba Nchu they got the assistance of the Police, one of whom accompanied them to house No. 175 where they met an old lady by the name of Magdalena Mpuru. He had with him four (4) photograph pictures marked A.B.C. and D (annexed) of which C and D were those of the applicant. The deposition of Lt. Mabathoana was that as he was talking to her, Magdalena Mpuru, who also filed an affidavit to the same effect, said her first born son was called Jacob Moiketsi Mpuru. He was born in 1948 at Tweespan in Soutpan district in Bradford in the Orange Free State. He had disappeared from home many years ago, she did not know his present whereabouts. Lt. 'Mabathoana then showed her the four (4) photograph pictures. She readily identified pictures marked C and D as the photograph pictures of her first born son Jacob Moiketsi Mpuru.

5/ According to

According to Lt 'Mabathoana when she looked at the pictures, Magdalena Mpuru burst into tears. She informed them that one of applicant's younger brother, one Abraham Molvigammala Mpuru was working in Bloemfontein and gave them the details of his place of work in Bloemfontein. As directed by Magdalena Mpuru, they went to Bloemfontein Municipality Bus Rank where Abraham Mpuru was working. Abraham confirmed that applicant was his elder brother who had left South Africa in 1976. When he was shown the photographs marked A,B,C and D, he also had no hesitation in identifying C and D as pictures of the applicant, his elder brother with whom they had grown up together.

The deposition of 68 years old Mahase Letsa Mahase was that he resided at Ts'akholo in the district of Mafeteng. 'Mantai Monaheng (born Mahase) was the daughter of his father's elder brother, one Rev. Azael Mahase. He has known 'Mantai from her birth. He knew that at her baptism, 'Mantai was given the name of Maryette which was, therefore, her christian name. On 23rd July, 1946 'Mantai got married to one Monyane Monaheng and at the solemnization of their marriage she used her christian name, Maryette as reflected on the copy of the marriage certificate (annexed) serial No. 1183. He knew this because he was present when the marriage of Maryette Mahase and Monyane Monaheng was solemnized in church - That the annexed copy of the marriage certificate serial No. 1183 was according to the records kept in his office an authentic copy of the original certificate of the marriage solemnized between Maryette Mahase and Monyane Monaheng, confirmed by the affidavit of the Assistant Registrar of Marriages in the Kingdom of Lesotho, one Mokone Baffoe - To the best of Mahase's knowledge, 'Mantai had not given birth to a child before her marriage and had that happened he would certainly have known. He specifically dismissed as false 'Mantai's allegation that on 8th September, 1948, she was unmarried and gave birth to an illegitimate son, the applicant. In 1948, 'Mantai was already married to

6/ Monyane

Monyane Monaheng for 2 years. He did not know the applicant. Moeketsi was the name of his (Mahase's) elder brother and not a surname in the family of Mahase. 'Mantai's averment that the name 'Moeketsi' was used interchangeably with the family name or surname 'Mahase' was equally false.

The applicant filed a replying affidavit in which he adhered to the contents of his founding affidavits. He, however, denied the averments made by the Respondents in their opposing affidavits save that the photographs marked C and D were his true pictures taken at the time he was serving his prison term at the Central Prison in Maseru.

Further affidavits were filed on behalf of the applicant and the Respondents. It must be pointed out that S.8(11)(12) of the High Court Rules 1980 provides:

"(11) Within seven days of the service upon him of the answering affidavit, aforesaid the applicant may deliver a replying affidavit.

(12) No further affidavit may be filed by any party unless the court in its discretion permits further affidavits to be filed." (My underlinings)

I am not aware that after the applicant had filed his replying affidavit, any of the judges of this Court permitted the filing of the additional set of affidavits. I certainly did not. That being so, I take the view that the filing of this additional set of affidavits after the applicant had filed his replying affidavit was not in accordance with Rule 8 (12). I am not, therefore, prepared to consider these affidavits.

In their affidavits, applicant and 'Mantai contended that applicant was born at Ts'akholo. This was, however, denied by Mahase Letsa Mahase who deposed

7/ that apart

that apart from living at 'Mantai's maiden home, Ts'akholo, he was the son of the younger brother of 'Mantai's own father. He was, therefore, her close relative. Mahase apparently knew so much of 'Mantai's personal details that I found it difficult to disbelieve him. As her close relative, for instance, he knew 'Mantai from her birth. She was christened by the name of Maryette. She later got married to Monyane Monaheng. Like a close relative of hers, he attended 'Mantai's marriage which was solemnized in church. At the marriage, 'Mantai used her christian name, Maryette as, indeed, reflected on the copy of the marriage certificate, serial No. 1183 (annexed). 'Mantai never had an illegitimate child prior to her marriage for had it happened, as her close relative, he would have known it.

Although she alleged that when applicant was born she was unmarried and only got married after the applicant had been born in 1948, 'Mantai could not produce any proof of her marriage in or after 1948 and the only available evidence in that regard was the marriage certificate produced by Mahase and confirmed by the Assistant Registrar of Marriages. In the absence of anything to the contrary, it seems to me that considered together with Mahase's evidence the marriage certificate conclusively gives a lie to the allegations that 'Mantai was unmarried in 1948 when applicant was born.

On the papers before me the probabilities are that Mahase's version that applicant is not 'Mantai's child is more probable than 'Mantai's story that he is. I am prepared, therefore, to accept as the truth Mahase's version and reject as false that of 'Mantai.

Applicant himself admitted that he had been serving 6 years imprisonment at the Central Prison in Maseru from 1978 until March, 1982 when he was released on parole. Although in his answering affidavit, he denied the averments contained in the affidavits of Magdalena

8/ Mpuru, Lt. 'Mabathoana ...

Mpuru, Lt. 'Mabathoana and Mahase, applicant did not dispute Sgt Molise's affidavit according to which his finger prints were compared with those of a person called Gabriel Mpuru and found to be the finger prints of one and the same person. We now know from the evidence deposed to by Lt. 'Mabathoana, Magdalena Mpuru and indeed the applicant himself that the photographs marked C and D are the true pictures of the applicant. According to Magdalena Mpuru, the applicant who is her own son was born in September, 1948 at Tweespan, in Soutpan district in Brandfort in the Province of Orange Free State in the Republic of South Africa. His true names are Jacob Moiketsi Mpuru. Her son has disappeared and she does not know his whereabouts. However, when she was shown the four (4) photograph pictures amongst which two (C and D) were admittedly those of the applicant Magdalena says she had no hesitation in picking up photographs C and D which she identified as pictures of her eldest son, the applicant.

According to Lt 'Mabathoana, on seeing the two photograph pictures, Magdalena Mpuru could not control her emotions and she burst in tears. It was proposed in argument that that was a natural reaction for an old woman who had not heard from her son for a long time and on being shown his pictures she might have thought that perhaps a mishap had happened to him. With this proposition, I entirely agree.

Considering her evidence together with that of Lt. Mabathoana on the photographs marked C and D and that of Sgt Molise, the finger prints expert, it seems to me that the probabilities are that Magdalena Mpuru was testifying to the truth when she said applicant whose photographs she had no hesitation in identifying was her own son, born in the Republic of South Africa. That granted, I am of the opinion that the applicant is just being naive in denying, in his answering affidavit, knowledge

of his own mother.

It is not in dispute that the Commissioner of Police (C.I.D.) is now in possession of Expulsion Order issued against the applicant in terms of the provisions of Section 5(3) read with Section 25 of the Aliens Control Act No. 16 of 1966 by the Minister of Interior on the grounds that by virtue of his birth applicant is a South African citizen and an alien whose presence in Lesotho is unlawful.

The decision in the present application revolves therefore, simply on whether or not the applicant is in fact an alien. As has been pointed out applicant claims he is not, hence this application. In terms of S. 32 of the Aliens Control Act, supra, the onus of proof that he is not an alien vests with the applicant. That section reads :

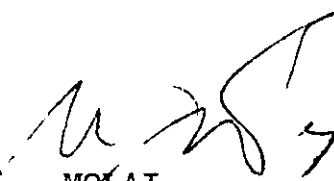
"32. The onus of proving or disproving any facts, the proof or disproof of which is required to establish for any of the purposes of this Act that a person is not an alien, or that a person is entitled to the benefit of sec. 38 and the 4th schedule, or that a person is entitled to the benefit of sec 39, shall lie on that person."

In the light of all that has been said above, it is obvious that the view I take is that considered as a whole the evidence point to but one thing, namely that the applicant has, on the balance of probabilities, failed to displace the onus that squarely rested on him.

It has been argued that in the event of this Court deciding that the applicant is an alien and can, therefore, be expelled from Lesotho, he should be given the opportunity to choose a country to which he could be deported. That in my view, is, in terms of the Provisions of S. 26 of the Aliens Control Act, supra a matter entirely in the hands of the minister responsible for the administration

of this Act and I am not convinced that it would be proper for the Court to interfere at this juncture.

In the result I come to the conclusion that this application ought not to succeed and it is accordingly dismissed with costs.


B.K. MOLAI
JUDGE

7th November, 1983.

For Applicant : Mr. Khauee,
For Respondent : Mr. Tampi.