CIV/A/4/84

IN THE HIGH COURT OF LESOTHO.

In the matter between :

EDWIN RALIOTLO PHAKISI — Appellant

V

OFFICER COMMANDING (CID) MOKHOTLONG — 1st Respondent
COMMISSIONER OF POLICE — 2nd Respondent
SOLICITOR-GENERAL — 3rd Respondent

J U D G M E N T

Delivered by the Hon. Acting Judge J.L. Kheola
on the 30th day of May, 1984.

On the 12th October, 1983 the Applicant made an Ex Parte application before the Magistrate of Mokhotlong praying for an order in the following terms.-

1. That a Rule Nisi do hereby issue calling upon the Respondents to show cause, if any, on a date to be determined by the Honourable Court, why.-

   (a) 1st and 2nd Respondents and their subordinates shall not be interdicted from ordering and/or requiring the Applicant to surrender his .38 revolver, plus ammunition (a) firearm serial No. 698264 in respect of which the Applicant hold a valid firearm certificate No. 8641/72.

   (b) 1st and 2nd Respondents and their subordinates shall not be interdicted from ordering and/or requiring the Applicant to surrender his firearm certificate in respect of the said revolver.

/2.

2. Further and/or alternative relief.

3. Costs of the suit.

4. That Rules 1 (a) and (b) operate with immediate effect.

On the return day the learned Magistrate confirmed the rule and ordered that each party must bear its own costs.

The Respondents have appealed against the order. The Applicant has also cross-appealed on the question of costs. In this judgment I shall refer to the Respondents as Appellants and to the Applicant as the Respondent.

On the day of the hearing of this appeal Mr. Pheko counsel for the Respondent, raised in limine the point that the appeal is now merely academic because the firearm certificate for 1983 had automatically expired on the 31st December, 1983. I disagree with him. The way I see it the interdict which was granted on the 18th January, 1984 is still operative. If it were not so, Mr. Pheko would not have asked for confirmation of the rule on the 18th January, 1984. It seems to me that because the order is still operative the Respondent is entitled to a renewal of the initial firearm certificate No. 8641/72 because the 2nd Appellant and his subordinates have been interdicted from ordering the Respondent to surrender the certificate. If they refuse to renew his certificate the Respondent would have every right to ask the Court to compel the 2nd Appellant

/and

and his subordinates to issue a renewal. The Court would compel them because the initial firearm certificate has not been revoked.

On the return day Mr. Pheko raised in limine the point that the opposing affidavit of the 2nd Respondent and the supporting affidavit by one Tseliso Ntsika had been attested by a junior official in the office of the 3rd Appellant. He contended that the junior official had an interest in the matter and could not act as a Commissioner of oaths in a matter in which the 3rd Appellant is a party. He referred to section 7 of the oaths and Declarations Regulations - Government Notice No. 80 of 1964 which reads:

> "7 A commissioner of oaths shall not attest any affidavit relating to a matter in which he has an interest."

There is a proviso but that has no relevance to the matter now under consideration. The Solicitor-General is the head of the Law office. All the crown counsels, Legal Draftsmen and the Registrar of Deeds are responsible to him. He can call upon anyone of them to advise him in any litigation facing the Government of Lesotho. I agree with Mr. Pheko that the assistant legal draftsman, who attested the affidavits has an interest in the matter. I take the Law office to be similar to a large firm of attorneys where some attorneys specialize in criminal or civil work while others specialize in conveyance or drafting of legal documents. Mr. Mpopo's argument is that the legal draftsmen do not

/do

do any court work. But there is nothing that can stop the Solicitor-General from instructing any of his staff to help his witness in the drawing up of an affidavit. In Louw v. Rickert 1957(3) S.A. 106 at p. 112 Boshoff, J. said:

> "The Court requires the security of an independant commissioner of oaths and I respectively disagree with the view that it would be extending the rule if it is applied to affidavits sworn before a clerk of the party's attorney where such clerk is employed not on court work but as a conveyancer. If I am correct in this view, the affidavits sworn before Leathers are insufficient and not acceptable as evidence. The rule nisi should ordinarily not have been granted on such affidavits."

I entirely agree and come to the conclusion that the affidavits sworn before an assistant legal draftsman in this case were defective and not acceptable in evidence.

As I stated earlier in this judgment this point was raised in limine. The learned magistrate heard the arguments by both counsels on this point. The correct procedure was to make a ruling on this point and then allow both counsels to address him on the merits. I agree with Mr. Mpopo that the Court a quo erred in considering and deciding on the merits of the application while it was seized only of legal points raised in limine. Mr. Mpopo applied for a postponement in order that he could get the chance to have the affidavits re-attested but this was refused by the Court a quo after Mr. Pheko had strongly opposed a postponement. I see no reason why the Appellants were not given the

/chance

chance to have their affidavits re-attested before another commissioner of oaths. The Respondent would have been compensated by awarding him costs.

In his judgment the learned magistrate said the affidavits were inadmissible evidence and that he would treat the application as unopposed. But immediately after saying that he applied evidence appearing in the affidavit of the 2nd Appellant. For instance, he refused to award costs to the Respondent because he had been suspected of having contravened certain provisions of the Internal Security (General) Act 1982. That allegation was raised by the 2nd Appellant in his affidavit.

I do not wish to go into the merits of this case because the Court a quo did not give both counsels the chance to address it on the merits. The court a quo did not exercise its discretion judiciously when an application for postponement was made. For the reasons stated above the appeal is upheld. The case is referred back to the magistrate's court to start de novo. There is no order as to costs. The appellants are given the opportunity to file their re-attested affidavits.

The learned magistrate deprived the Respondent of costs on the ground that where the Commissioner of Police and the Solicitor-General make mistakes in the execution of their duties it is unfair to make the tax payer suffer because of that. I appreciate the

/sympathy

sympathy of the learned magistrate to the tax payer, but he must not forget that it is the tax payer who elects a government. As a legal person the government will always act through its officials. Does the learned magistrate mean that whenever the government loses a case it should not be ordered to pay costs because it is its officials who have made a mistake? I do not agree with that proposition. The Government, like any other person who loses a case, must pay costs if the circumstances of the case justify such an order. In my view the Respondent was entitled to be awarded costs even if the application for postponement was granted. The General rule is that the successful party should be given his costs and this rule can only be departed from where there are good grounds for so doing. In the present case there are no such grounds. The cross-appeal succeeds with costs to the Respondent.

ACTING JUDGE
30th May, 1984.

For Appellant : Mr. Pheko
For Respondents : Mr. Mpopo