CIV/APN/91/90

IN THE HIGH COURT OF LESOTHO

In matter between:-

SAMUEL MOKETE TUMO — Applicant

and

ATTORNEY-GENERAL — 1st Respondent
MINISTER OF DEFENCE AND INTERNAL SECURITY — 2nd Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 26th day of June, 1990

This is the extended return day of a RULE NISI granted on the 12th April, 1990 in which the second respondent was called upon to show cause if any, why:

(a) Second Respondent and/or officers subordinate to him shall not be directed to produce the body of Applicant before this Honourable Court so that Applicant may be dealt with in accordance with law;

(b) Second Respondent and/or officers subordinate to him shall not be directed to allow Applicant to see his present attorney in private and a medical practitioner of his own choice forthwith;

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(c) Second Respondent and/or officers subordinate to him shall not be directed forthwith to stop forthwith from interrogating Applicant in respect of the offence with which he stands charged;

(d) Second Respondent and/or officers subordinate to him shall not be directed to stop forthwith from assaulting Applicant and subjecting Applicant to the sort of interrogation to which Applicant was subjected when Applicant was detained at the Maseru Maximum Prison between the period 19th February, 1990 . to 7th March, 1990;

(e) Second Respondent and/or officers subordinate to him shall not be directed forthwith to allow Applicant's wife and Applicant's other close relatives to see Applicant;

(f) Alternatively to paragraphs (a) to (e) Second Respondent and/or officers subordinate to him shall not be directed to release Applicant forthwith;

(g) Respondents shall not be directed to pay the costs hereof.

The material facts of this case are not in dispute and they are as follows:

On or about the 20th February, 1990 the applicant was a member of the Royal Lesotho Defence Force and holding the rank of Captain. On the same day he was arrested by the members of the Royal Lesotho Defence Force and detained at the Maseru Maximum Security Prison. On the 7th March, 1990 he was taken to the magistrate's court for remand on a charge of attempted murder.

On the 3rd April, 1990 the applicant was released on bail in CRI/APN/98/90. After he was released he was immediately arrested again by members of the Royal Lesotho Defence Force. He was taken back to Maseru Maximum Security Prison.

The founding affidavit in these proceedings was filed by the wife of the applicant, Agatha Tumo. She avers that when the applicant was arrested she was present. The members of the Royal Lesotho Defence Force (R.L.D.F.) who arrested him never told the applicant the reason for his arrest and no charge was given to him. She deposes that her husband is no longer subject to military law. He had committed no offence nor was he about to commit any offence when he was arrested.

One of the answering affidavits is deposed to by Captain Tello Makhoa a member of R.L.D.F. He deposes that on the 3rd April, 1990 he arrested the applicant and there and then informed him that he was being arrested on suspicion that he was involved in an offence of mutiny and conspiracy to endanger public safety.

Another answering affidavit was made by Colonel Tseliso Metsing of the R.L.D.F. He deposes that he is making this affidavit on behalf of the second respondent and in his capacity of having day-to-day command of the R.L.D.F. He categorically denies that the applicant was ever dismissed from the Force.

In paragraphs 9 and 10 of his affidavit Colonel Metsing deposes:

"It is admitted that the Applicant who at all times is subject to Military Law was arrested by members of the Force on the 20th February, 1990, on my instructions, because the Command of the force had credible information that the applicant along with some members of the former Military council who had been removed from their offices was engaged in conspiracy aimed at overthrowing the lawfully constituted Government and to stage a mutiny within the force. Information also irresistibly pointed to the fact that the applicant and his accomplices were also planning to assassinate members of the command structure of the army. There is also room for suspecting that the applicant had indulged in well planned robberies to generate funds to stage a mutiny."

"We had information that the applicant and some others had unlawfully stock-piled arms and ammunition in their residences. Two hand grenades were found at the applicant's residence in Maseru and one at his house at Fobane in the district of Leribe. These grenades were not lawfully issued to the applicant and consequently his possession of them at his residence constituted serious contravention of military discipline and had ominous significance."

Colonel Metsing avers that the applicant was never assaulted or tortured. He is kept in prison in very humane conditions. He is regularly visited by a medical practitioner. Access was also provided for the applicant's attorney of record. He avers that in terms of section 162 of the Royal Lesotho Defence Force Act, 1980, as amended, the detention of the applicant is lawful.

Captain Tsangoane Lesaoana of R.L.D.F. deposes that on the 26th February, 1990 he conducted a search at the residence of the applicant at Makhotsa's premises in Lithabaneng and found two M26 type hand-grenades in the applicant's main bedroom tucked in a side-board. The search followed suspicion that the applicant was

involved in a military disciplinary offence of mutiny and conspiracy to assassinate a member of the Force, the Chairman of the Military Council and Council of Ministers, Major-General Justin Mesting Lekhanya. He avers that the two hand-grenades were not lawfully issued to the applicant.

There is another allegation by Colonel Metsing that one hand-grenade was found in applicant's house at Fobane in the district of Leribe.

It seems that on the 30th April, 1990 the applicant's attorney of record had the opportunity to meet his client and a replying affidavit was prepared and signed by the applicant. He avers that Colonel Metsing cannot in law make an affidavit on behalf of anybody. He is not even duly authorized by the second respondent to make an affidavit on his behalf.

Regarding his position in the Force the applicant avers that the Government is certainly confused because in their affidavits in CRI/APN/98/90 Staff Sergeant Maluke and the D.P.P. alleged that he had been dismissed but in the present proceedings Colonel Metsing denies that he (applicant) has been dismissed from the Force. He denies that he was ever involved or engaged in any conspiracy to overthrow the Government or to assassinate any members of the Command structure of the Force. Cols. Thaabe Letsie, Mosoeunyane and Mokhantso have been released from detention and yet they are the people with whom he is alleged to have planned the commission of the alleged offences. It is unimmaginable that he can stage a mutiny in the Force alone.

He admits that two hand-grenades were found in his house in Maseru. He received them from one Sergeant Bereng Lerotholi who asked him to teach him how to use them because he (applicant) was an instructor in the Force. He says that Col. Metsing knows very well that the two hand-grenades in question were seized from the insurgents.

The applicant denies that he has committed any offence relating to the Force. The Government wants to detain him indefinitely for no apparent reason because no charge has been preferred against him despite the fact that he has been in detention for a long time. His arrest and detention, which are wrongful and unlawful, were actuated by malice.

He reiterates that Captain Makhoa did not inform him of the reason of his arrest. He does not say that in effecting the arrest he was acting on the instructions of Col. Metsing. He is no longer subject to military law. Although through ignorance of the law he regarded himself as a captain in the Force, he was never commissioned by His Majesty the King pursuant to Part III of the Royal Lesotho Defence Force Act 1980. The effect of this is that he was never a commissioned officer.

On the 17th April, 1990 he tendered his resignation in terms of section 27 of the Royal Lesotho Defence Force Act 1980 (The Act). He enclosed a cheque for his salary for the month of April, 1990. The resignation was refused on the ground that he had followed the wrong procedure by acting through his attorney and not through his superiors and that he had to enclose his full or gross salary. See Annexures "A" and "AA" to replying affidavit).

The applicant avers in paragraph 16 (b) of his replying affidavit that his detention is unlawful despite the provision of section 162 of the Act (as amended). He avers

> "This new law was passed on 12th April, 1990 which was the return date. It is retrospective to 19th February, 1990. This is yet another attempt by Government to keep me in detention at all costs. I submit that it had to be passed because Government had no leg to stand on in relation to my arrest and detention. The Commander has not filed any affidavit. It is impossible to ascertain from this order what objective ascertainable facts he had when he made the order. At the time the order was made I had been in detention for almost ten days after my arrest on 3rd April, 1990. In terms of the amended section I could not, if I was still subject to military law, be kept in custody for a period exceeding seven days. From the seventh day my detention was wrongful and unlawful. The order is dated 12th April, 1990. It is not retrospective. It cannot even if it was properly made justify my continued detention. I shall deal with this material at length at the hearing hereof."

On the 19th June, 1990 I heard oral evidence because it had become clear from the affidavits and arguments made by counsel that there was a dispute of fact regarding whether on arrest Captain Makhoa told the applicant the reason for his arrest. Captain Makhoa testified that he told the applicant that he was arresting him for uprising against his seniors and for doing things which endanger public safety.

The applicant testified that after he was released on bail on the 3rd April, 1990 he proceeded towards the main gate of the Central Prison. He saw that Captain Makhoa and Captain Phafane were standing outside the gate. As soon as he walked out of the gate the two captains came to him. Captain Makhoa greeted him and shook hands with him. He then said: "Man, I am arresting you again." The applicant says that he asked Captain Makhoa why he was arresting him again. The latter did not answer the question but merely said: "Let's go." He complied.

The wife of the applicant testified and confirmed the evidence of her husband in all material respects.

I found Captain Makhoa to be a very unreliable witness. He was very evasive and wanted to avoid the obvious things. He arrested the applicant at the gate of the Central Prison but he was not prepared to admit this fact. Instead he said he arrested the applicant somewhere between the gate of the Central Prison and Lancers Inn which is well over two hundred metres away. It was only after long cross-examination on this point that he admitted that he arrested the applicant at the gate of the Central Prison immediately he was released by the prison authorities after he had been granted bail.

On the other hand the applicant and his wife impressed me as being very honest and gave their evidence in such a forthright manner that I had no doubt that they were telling the truth that Captain Makhoa did not tell the applicant the reason for his arrest.

The first issue with which I propose to deal is whether at the time of his arrest on the 3rd April, 1990 the applicant was subject to military law or not. I agree with the applicant that the police and military authorities are confused about the position of the applicant in the force. In the bail application their attitude was that the applicant had been dismissed and for that reason he was likely to leave the country to look for a job in the Republic of South Africa. The Court found that it was not correct that he had been dismissed because he was still receiving his salary. In the

present proceedings the military authorities have now changed their stand and they are now saying the applicant has never been dismissed and that he is still subject to military law. It seems to be that the respondents blow hot and cold when it suits them.

Because of this uncertainty on the 17th April, 1990 the applicant formally tendered his resignation in terms of section 27 of the Act, which provides that:

> "(1) Subject to the provisions of this section, a soldier of the regular force shall be entitled to claim his discharge at any time within three months after the date of his first attestation and if he makes such claim he shall on payment of M100 be discharged with all convenient speed but discharge shall remain subject to military law.
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> (2) The provisions of section 21 shall not apply to a soldier discharged under the provisions of this section.
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> (3) A soldier of the regular force shall not be entitled to claim his discharge under subsection (1) while soldiers of that force are required to continue their regular service under the provisions of section 20.

Section 21 provides that:

> "(1) Save as in this Act provided, every soldier of the regular force upon becoming entitled to be discharged shall be discharged with all convenient speed, but shall until discharged remain subject to military law."

Mr. Pheko, attorney for the applicant, submitted that the applicant had a right to purchase his discharge because in law he was not a commissioned officer in terms of section 11 of the Act.

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Section 11 provides that the power to grant commission in the Force shall be vested in the King acting on the advice of the Minister. It further provides that every officer upon being granted a commission shall be issued with a commission by the Minister in the form set out in the First Schedule.

It is common cause that the applicant was promoted to the rank of Captain on the 14th April, 1986 but has never been issued with a commission by the Minister in the form prescribed or in any form. The King never granted him a commission. It follows that the applicant is a non-commissioned officer and therefore a soldier. In section 2 of the Act "soldier" is defined as follows:

> " "Soldier" does not include an officer but with the modifications contained in this Act in relation to warrant officers and non-commissioned officers, includes (except where the context otherwise provides) a warrant officer and a non-commissioned officer."

In my view the applicant was still a soldier on the 3rd April, 1990 and the allegation that he had been dismissed was not correct, hence the failure by those who claimed that he had been dismissed to produce a copy of the letter of dismissal. As a soldier the applicant was entitled to purchase his discharge in terms of section 27 of the Act. The resignation was turned down for the reasons stated above. The first reason that he had to process his letter through his senior officers cannot hold water because at the relevant time the applicant was in solitary confinement and had no access to paper and pen. In any case I think that the letter was addressed to the right person - the Commander. It was also in order because it was written by an attorney representing

the applicant. It does not make sense to say the resignation had to be made through his superiors and not through his attorneys. A soldier who is in detention can act through his attorneys.

It was also wrong to demand that the applicant should tender his gross and not net salary. Section 27 provides for only M100-00 and the applicant had surrendered an amount of M1,112-62. The cheque was returned to the applicant and his attempt to purchase his discharge was refused. Because of this refusal which was partly based on ignorance of the law the applicant is still a soldier.

I must also point out that the letter of resignation was also wrong because an amount far in excess of M100 was enclosed. The military authorities were entitled to refuse the application and to refer it back to the applicant and demand the amount prescribed by law. It seems to me that both parties did not know the law.

Be that as it may I think the crucial date is the 3rd April, 1990 when the applicant was arrested. Was he subject to military law on that date? I think the answer is obviously in the affirmative. On that date the applicant was still a soldier as a non-commissioned officer and was therefore subject to military law. His letter of resignation dated the 17th April, 1990 clearly indicates that he also regarded himself to be still a soldier.

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I come to the conclusion that on the 3rd April, 1990 the applicant was subject to military law and that even to-day he is still a soldier unless he has been dismissed or has properly purchased his discharge.

The second issue is whether the arrest of the applicant was in accordance with the provision of section 73 (2) of the Act. Mr. Pheko submitted that there was no compliance with the subsection which provides that an officer may be arrested by an officer subject to military law of superior rank or if engaged in a quarrel or disorder by such an officer of any rank. Mr. Pheko submitted that the applicant was arrested by an officer of the rank of captain who was of an equal rank with the applicant.

The applicant cannot have it both ways. He has just established that because he was not granted a commission by the King he remains a soldier because a non-commissioned officer is defined as a soldier in section 2 of the Act. It seems to me that the arrest was in order because it was effected by a captain on a non-commissioned officer. The arrest was in terms of section 73 (3) of the Act which provides that a soldier may be arrested by an officer, warrant officer or non-commissioned officer subject to military law: provided that a person shall not be arrested by virtue of this subsection except by a person of superior rank. Captain Makhoa is an officer of a superior rank to that of the applicant.

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The arrest was said to be unlawfual on the second ground that in terms of section 162 (1) of the Act (as amended) it must be the Commander who must have the suspicion that a person subject to military law is involved in or is suspected of having committed an offence under Part V of the Act. It was submitted that it must be the Commander who must make an affidavit. Section 162 reads as follows:

> "(1) Notwithstanding any provision of Part V, where the Commander is of the opinion that a person subject to military law is involved with, or is suspected to have committed an offence under Part V, and that it is expedient for the protection and preservation of national security, he may,
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> (a) arrest or cause to be arrested that person without notice to such person; and
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> (b) detain or cause to be detained that person for a period not exceeding one year in a prison designated by the Commander for that purpose.
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> (2) The Commander may, at any time, order the release of a person detained under subsection (1)."

Mr. Tampi, Crown - Attorney, submitted that in the military establishment the Commander can act through agents. Col. Metsing was acting as an agent of the Commander. I think there is some substance in this argument because Col. Metsing has deposed that he is making the affidavit on behalf of the second respondent and in his capacity of having the day-to-day command of the Force. In my view Col. Metsing is the agent of the Commander and is in charge

of the day-to-day administration of the Force. He has averred that the facts he has deposed to herein are within his personal knowledge unless the context otherwise indicates. That he has also relied on information which has reached him through his officers.

In paragraph 10 of his affidavit Col. Metsing refers to two hand-granades found at the residence of the applicant. Captain Lesaoana has made an affidavit to the effect that he searched the applicant's residence and found the two hand-grenades referred to above. This information came to Col. Metsing through his officers. He deposes that following the information he had received he issued instructions that the applicant be arrested. It is apparently under these instructions that Captain Makhoa arrested the applicant. I say apparently because in his affidavit Captain Makhoa does not say so.

Section 73 (1) of the Act does not require that a person effecting the arrest must in all circumstances be the one who has reasonable grounds for suspecting that a person subject to military law has committed an offence under the Act. It also provides that a person may arrest a person subject to military law if "is alleged to have committed ..... any such offence". In my view a mere allegation that a person has committed an offence cannot be equated with a suspicion based on reasonable grounds. Captain Makhoa received instructions from his superiors and an allegation was made that the applicant was involved in the commission of an offence under Part V of the Act. The Act (Section 73) entitled him to arrest on an allegation without him having reasonable grounds for believing that the allegation is correct.

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Section 24 (b) of the Criminal Procedure and Evidence Act 1981 provides that:

> "Every peace officer and every other officer empowered by law to execute criminal warrants may arrest without warrant -
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> (b) every person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in part II of the First Schedule."

This section clearly indicates that the peace officer effecting the arrest must himself have reasonable grounds for suspecting that the person he is arresting has committed an offence mentioned in Part II of the First Schedule. When section 24 (b) of the Criminal Procedure and Evidence Act is contrasted with section 73 (1) of the Act the intention of the Legislature becomes very clear that the officer or soldier effecting an arrest need not have reasonable grounds for suspicion in all cases, sometimes an allegation by others to him is sufficient.

Subsection (4) of section 73 of the Act gave Col. Metsing the power to give orders for the arrest of the applicant.

In Johnny Wa Ka Maseko v. Attorney-General and another, C. of A. (CIV) No. 27 of 1988 (unreported) Ackermann, J.A. had to interpret section 13 (1) of the Internal Security Act which provides that:

> "A member of the police force may arrest without warrant a person whom he reasonably suspects to be a person involved in subversive activity."

At page 29 the learned judge said:

> "From the plain wording of section 13 (1) it is the person or persons who actually carry out the arrest who must entertain the suspicion. It was argued however that police officer Lethunya, who arrested the appellant was the agent or instrument of the second respondent. This submission is in my view unsound. When Lethunya purported to arrest appellant he was acting neither as an agent, servant or instrument of second respondent. He arrested appellant because he had the statutory power to do so in terms of ss. 13 (1) and if he wished to exercise his power to do so he had to satisfy himself that he was entitled to do so."

Again this section is couched in entirely different words from section 73 (1) of the Act. The latter does not say it must be the person effecting the arrest who must have the suspicion.

The next question is whether in exercising his powers under section 73 (1) and (4) of the Act Col. Metsing had reasonable grounds for suspicion that the applicant had committed any offence under Part V of the Act. In Maseko's Case - supra - at page 31 Ackermann, J.A. said:

> "It was common cause that in the present case the jurisdictional facts justifying arrest in terms of ss 13 (1) were not dependent on a subjective state of mind of the arresting member of the force, but on an objective criterion, depending on proof by the second respondent that he as a matter of fact entertained the requisite suspicion and that such belief was reasonable in all the circumstances. In other words, the existence of the "reasonable suspicion" is objectively justiciable. (See Minister of Law and Order v. Hurley and Another 1986 (3) 568 (A) at 577 I - 583 H and in particular at 583 G-H)."

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In the present case the applicant was suspected of mutiny and insubordination and conspiracy to overthrow the Government or to endanger public safety. The only fact upon which the suspicion was based appears to be that the applicant's residence was searched and that two hand-granades were found. It has been deposed that the hand-granades were not lawfully issued to him. The applicant denies this and alleges that they were given to him by Sergeant Bereng Lerotholi for purposes of instruction. The applicant has not informed the Court what the position of Sergeant Lerotholi is regarding the issue of weapons to the Members of the Force. He has not established how Sgt. Lerotholi gained access to these dangerous weapons. He has not given any reason why he kept the hand-grenades at his house. Surely there must be a safe place at his place of work where such things are safely kept under lock and key. The applicant alleges that it is a common practice within the Force for officers to keep weapons at their residences. I think that even if that is the practice there must be a proper record of such weapons and to whom they have been issued. His superior officers say that he was in unlawful possession of those hand-grenades and the Court cannot disbelieve them because the applicant has failed to prove that they were lawfully issued to him.

I am of the opinion that the suspicion Col. Metsing had was based on reasonable grounds. There is an additional hand-granade that was found at Fobane at what his superiors call his house but which the applicant calls his parents' house. It does not matter that the house belonged to the applicant or his parents but the fact is that it has some connection with the applicant. It was therefore not altogether unreasonable for his superiors to connect him with that third hand-grenade.

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If I am right that Col. Metsing acteng as an agent of the Commander, then the opinion which the Commander formed in terms of subsection (1) of section 162 (as amended) was based on reasonable grounds. It was argued that because he has not made any affidavit it cannot be known what objective factors he took into account before he made the detention order. In my view it can be inferred that he acted on the information he received from his agent.

Section 162 (as amended) is retrospective because it was passed on the 12th April, 1990 but it is deemed to have come into operation on the 19th February, 1990. But the order of detention issued by the Commander on the 12th April, 1990 does not purport to be retrospective and I doubt if the mere passing of Order No.3 of 1990 which amended section 162, can make it retrospective. We now have a situation where the detention of the applicant shall be divided into two parts. The first part is from the 3rd April to the 11th April, and the second is from the 12th April to-date the effect of this retrospective legislation is to validate the acts which were done before the new law was passed. So it is not correct to say that because the old law provided for detention for seven days, the detention beyond that period is unlawful. The effect of the new law is that the old law seized to operate on the 19th February, 1990.

I have formed the opinion that the order of detention made by the Commander of the R.L.D.F. dated the 12th April, 1990 is valid and lawful at least from the date it was made. I do not wish to

to express any opinion about the lawfulness or otherwise of the detention covering the period from the 3rd April to the 11th April, 1990 not covered by the order of detention made by the Commander on the 12th April, 1990.

The words "Notwithstanding any provision of Part V" appearing in the new section 162 of the Act mean that without prevention by or regard to the provisions of Part V of the Act, the Commander may arrest or cause to be arrested that person suspected of having committed the offences under Part V of the Act. And he may detain or cause to be detained that person for a period not exceeding one year.

It seems to me that in exercising his powers under section 162, the Commander shall not have regard to section 73 of the Act which deals with arrest of a person suspected of having committed an offence under the provisions of the Act. It means that even if the arrest was not done in strict compliance with the provisions of section 73 the Commander is still entitled to exercise his powers under section 162. In the present case the arrest of the applicant was done before the Commander made the order that the applicant be arrested and be detained at the maximum Security wing of the Maseru Central Prison. On the 12th April, 1990 when the order was made the applicant was not released and then immediately arrested again in terms of the order. I am of the view that the order had the effect of validating the arrest and the detention from the date of the order.

The question is whether this Court is entitled to look behind the Commander's order and decide whether the initial arrest was [illegible]

or not. From the words "notwithstanding any provision of Part V" appearing in section 162, the intention of the legislature seems to be that this Court is not entitled to decide on the lawfulness or otherwise of the initial arrest because in doing so the Court would be considering what is excluded by law. The Court would have to find out whether or not the provisions of section 73 of the Act were complied with and this would be contrary to the provision of section 162. However, in a proper case initiated by the order of the Commander in terms of section 162 this Court is entitled to decide the lawfulness of the arrest probably under common law and not under section 73 of the Act. As I have already stated above the effect of the order was to validate the arrest and detention from the date the order was made.

At the commencement of the hearing of this application I was informed by the applicant's attorney that since the respondents were served with the interim order they have complied with the following paragraphs of the order: (b) and (e) of the interim order.

For the reasons stated above I make the following order:

1. Paragraphs (a), (c), (d) and (f) are discharged.
2. Paragraphs (b) and (e) of the interim order are confirmed.
3. The applicant is ordered to pay 2/3 of the respondent's costs.

J.L. KHEOLA
JUDGE

26th June, 1990.

For Applicant - Mr. Pheko
For Respondents - Mr. Tampi.