CIV/APN/109/90

# IN THE HIGH COURT OF LESOTHO

In the matter between:-

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| THE HONOURABLE MINISTER E.R. SEKHONYANA | Applicant |

and

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| MAZENOD PRINTING WORKS (PTY) LTD | 1st Respondent |
| MOELETSI OA BASOTHO | 2nd Respondent |
| J.M. KHUTLANG O.M.I. | 3rd Respondent |

## J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 16th day of September, 1991.

This is an application for an order in the following terms:-

"(1) That a rule *nisi* is hereby issued calling upon Respondents to show cause (if any) why Applicant should not be granted an order in the following terms:

(a) That Respondents be prohibited from printing and/or publishing and/or circulating any article or any matter whatsoever which is intended to all which' has the effects of impairing Applicant's dignity obvious fair name and fame, pending the finalization of an action to be instituted by Applicant against Respondents for a final interdict prohibiting Respondents from doing the abovementioned thing.

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(b) That Respondents pay the costs of this application;

(c) Granting such further and/or alternative relief as the above Honourable Court deem fit;

2. That prayer 1(a) above operate as an Interim Interdict with immediate effect pending the final adjudication of this application;

3. That a period of service provided for by the Rules of this Honourable Court be dispensed with;

4. That the action contemplated herein be instituted within one month from the date of the final adjudication of this application;

5. That the Order of this Honourable Court together with the Notice of Motion and all supporting documents be served upon the Respondents forthwith;

6. Such further and/or alternative relief be granted to Applicant as this Honourable Court may deem fit."

On the 14th May, 1990 the applicant obtained the above rule but after several extensions the rule finally lapsed. At the hearing of this application on the 28th May, 1991 the rule was reinstated by agreement of the parties.

In his founding affidavit the applicant deposes that he is the Minister of Finance and Planning of the Government of the Kingdom of Lesotho. He avers that on or about the 22nd day of April, 1990 the first and second respondents published or caused

to be published and widely circulated an article in Sesotho in the newspaper Moeletsi oa Basotho under the heading (as translated):

"The Nation is overfed joy and disappointments."

The full article appears as Annexures "A" and "A1" in Sesotho and English respectively. The said article was continued in the issue of Moeletsi oa Basotho of the 29th April, 1990 and the original tear sheet of the newspaper and the certified English translation thereof is annexed and marked Annexure "B" and "B1" respectively.

The applicant avers that the second part of the said article contains the following defamatory statement, maliciously published and calculated to do damage to his fair name and reputation:-

> "Many Basotho live in old houses even though there are many beautiful houses that have nobody living in them. Amazing thing that is visible is a house built along the main road in the village of Chief Matala. Its about six years to date that the house has been closed not being opened. Other people who know about this house, although they seek to or tell me in secret as they will be afraid to get involved and that I shouldn't say the names, say:-
>
> That house was built for one Chieftainess/Madam of Lioling that house was built by the new Minister of Finance and Planning with the Nation's money."

He avers that there can be no doubt that whilst the person referred to is "a New Minister of Finance and Planning" there is only one such official, namely the applicant, and any normal intelligent reader of the article will understand that it is the applicant who is guilty of building a house for a Lady of Lioling with public funds. The full import of article is that the applicant, whilst many in his country are confined to old houses, would misappropriate public funds to indulge a Lady of Lioling by building a house for her, which is not even used.

The applicant denies that the statement published by the respondents is true and avers that the first and second respondents knew well that the article would be connected with him by the average intelligent reader and that the above meaning would be given to it by the average intelligent reader which is in fact the case and which causes him great harm. He avers that he has a clear right to his integrity both as a person and as a public official which right must be protected. He will suffer irreparable harm if the respondents are not interdicted. He has no other effective remedy to end this wrong as the seeds of doubt and suspicion caused upon him by the articles undermine his position of integrity as a Minister of Finance and Planning in the present Government; a situation which can never be compensated by a claim for damages.

The applicant avers that the balance of convenience favours him as on the one hand the applicant may be ruined by the defamatory matter published against him by the respondents

whilst if the respondents are prohibited from so doing they will lose nothing save perhaps the potential of selling a few more newspapers if a particularly vicious defamatory article is carried.

In his opposing affidavit the third respondent avers that it is the duty of the second respondent, of which he is the editor, to disseminate information to the people in the public interest. It is the duty of the press to scrutinize the action of government and its Ministers and in the public interest to bona fide publish whatever is in the public interest, so that high moral standards and integrity can be maintained in high places. It is lawful to publish a defamatory statement which is true, provided that the publication is for the public benefit. The applicant is not entitled to assume that that whatever is published "which has the effects of impairing his dignity" ought not to be published merely because he imputes on other people the intention to impair his dignity. He avers that he and the second respondent have never intended to impair applicant's dignity despite the fact that the truth they publish might have the effect of impairing his dignity.

The third respondent avers that the applicant is in public life, he handles the meagre financial resources of the nation, he is therefore not entitled to prevent the press from exposing any past or present or future misdeeds that may emerge which the public is expected to know for its benefit as Ministers of the Crown are expected to be men of high moral calibre and integrity and honesty which are unassailable. He emphatically denies that

there is anything malicious and defamatory in disclosing the truth that the Minister of Finance has built a house for one "Chieftainess/Madam of Lioling" with the nation's money because it is the truth and the nation ought to know. Hence the call to Government for a Judicial Commission of Inquiry.

The law regarding the granting of temporary interdicts was summarized by Clayden, J. in Webster v. Mitchell, 1948 (1) S.A. 1186 (W.L.D.) at pages 1189 - 1190 in the following words:

> "From the Appellate Division cases to which I have referred I consider that the law which I must apply is that the right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is "prima facie established though open to some doubt" that is enough. I do not think it necessary to decide whether the test of a "reasonable prospect of success" applied by MALAN, J., is a proper paraphrase of the words of INNES, J.A.
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> If the phrase used were "prima facie case" what the Court would have to consider would be whether the applicant had furnished proof which, if uncontradicted and believed at the trial, would establish his right. In the grant of a temporary interdict, apart from prejudice involved, the first question for the Court in my view is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. Prima facie that has to be shown. The use of the phrase "prima facie established though open to some doubt" indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the

applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief. Although the grant of a temporary interdict interferes with a right which is apparently possessed by the respondent, the position of the respondent is protected because, although the applicant sets up a case which prima facie establishes that the respondent has not the right apparently exercised by him, the test whether or not temporary relief is to be granted is the harm which will be done. And in a proper case it might well be that no relief would be granted to the applicant except on conditions which would compensate the respondent for interference with his right, should the applicant fail to show at the trial that he was entitled to interfere."

In Morena E.R. Sekhonyana v. Mike Pitso and another, CIV/APN/381/88 (unreported) at pages 20-21 Cullinan, C.J. had the following to say:

"As Lord Diplock observe, the court in grnting an interlocutory injuction is operating in a state of uncertainty: the only certainty which may arise is that the plaintiff has no prospect of success at the trial, in which case the application will be refused. If that is not the case, then there is "a serious question to be tried", a triable issue", "an arguable case", or "a prima facie case open to doubt": as I have indicated

earlier, the case must be rare where upon interlocutory application, the right is beyond dispute. The point is, that there is uncertainty, and I see little to be gained in attempting to assess the extent of the uncertainty. The Court must do its best to prevent injustice in such state of uncertainty. It must then, in my view, as a separate issue, decide where the balance of convenience lies. If the balance swings to one side, it matters not in my judgment how marked is such swing."

I shall now deal with the facts of this case. It is common cause that on the 29th April, 1990 the third respondent published in the second respondent an article in which he stated in no uncertain terms that the applicant has built a house for one Chieftainess of Lioling. That house was built by the applicant with the nation's money. Because the respondents have admitted publishing those words, the first question is whether they are defamatory or not. I am of the opinion that the words are defamatory because the full import of the article is that the applicant, while many people in the country are confined to old houses, would misappropriate public funds to indulge a Lady in Lioling by building a house for her, which is not even used. The respondents are actually alleging that the applicant has stolen public funds and used them to build a house for a Lady in Lioling. I am of the opinion that any average intelligent reader will understand the words to mean that the applicant has built a house for a Lady in Lioling with public funds and that the house is not even being used while some people in this country live in old houses.

The third respondent avers that the applicant is not entitled to assume that whatever is published "which has the effect of impairing his dignity" ought not to be published merely because he imputes on other people the intention to impair his dignity. It seems to me that in the instant case the words are defamatory per se and that any reader of average intelligence will give to them the meaning stated above.

The third respondent avers that it is lawful to publish a defamatory statement which is true provided that the publication is for the public benefit. I agree with this allegation, but does it mean that the respondent must just make a bare allegation without substantiating it with some facts upon which he relies? I do not think so. As Clayden, J. pointed out in Webster v. Mitchell - supra -

> "But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."

It is not enough for the respondents to merely state that the defamatory statement is true and that it is for the public benefit. They must place before the Court some facts to show that the statement is true. They ought to have placed before this Court some facts to show that the applicant is or may be guilty of misappropriating public funds and used them to build a house for a Lady of Lioling. I am of the opinion that the respondents are not entitled to withhold whatever evidence they have that the applicant has misappropriated public funds and used

them for an unlawful purpose and allege that such evidence will be used at the trial. Supposing they are not going to adduce such evidence at the trial because they in fact have no such evidence, should the Court allow them to continue to publish the defamatory statements until the date of the trial? It seems to me that such a state of affair is not allowed by the law.

I am of the opinion that the applicant has established that he has a clear right to his integrity or dignity both as a person and a public official which right must be protected. I agree with the third respondent that the duty of the press is to scrutinize the actions of the Government and its Ministers and in public interest to bona fide publish whatever is in the public interest, so that high moral standards may be maintained in high place. The most important qualification I wish to make is that the criticism must be true because people in high places must not be smeared with lies.

The injury has already been committed and there is a reasonable possibility that it is going to be continued because these defamatory statements first appeared in the second respondent in the edition of the 22nd April, 1990 and was continued in the edition of the 29th April, 1990. I am of the opinion that the apprehension of the applicant that the respondents would continue to defame him was not unfounded.

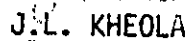
I am of the opinion that there was no other remedy available to applicant because not even claim for damages would clear his good name again.

I was referred to section 8 of the Human Rights Act 1983. That section provides that in exercising the right of freedom of expression, the respect of rights or reputations of others must be observed. In the present case the reputation of the applicant is being attacked without any evidence that he has misappropriated public funds.

It is correct , Johny Wa Ka Maseko v. Attorney General and another, C. of A. (CIV) No. 27 of 1988 (unreported) vindicated the right of free speech against the abuse of the principle of protection of reputations and National Security. That case can be distinguished from the present case because there was evidence before the Court of Appeal about the alleged misdeeds of the person involved. There is no such evidence in the present case.

The balance of convenience favours the applicant because he might be ruined by the publication of the defamatory matter and might lose his position of Minister of Finance and Planning. The Government or the Military Council might decide to dismiss him. His whole future in politics might be ruined. On the other hand if the interdict is confirmed the respondents will not lose anything.

In the result the rule nisi is confirmed with costs.



J.L. KHEOLA
JUDGE

16th September, 1991.

For Applicant - Mr. Mphalane
For Respondents - Mr. Maqutu.