C. of A.(CIV) No.27/94

IN THE LESOTHO COURT OF APPEAL

In the matter between:

1ESOTHO HUMAN RIGHTS ALERT GROUP	Appellant
vs	
THE MINISTER OF JUSTICE & HUMAN RIGHTS	1st Respondent
AND	
THE DIRECTOR OF PRISONS	2nd Respondent
AND	
THE ATTORNEY GENERAL	3rd Respondent

HELD AT:
MASERU

CORAM

TEBBUTT, A.J.A.
STEYN, A.P.
KOTZE, J.A.

J U D G M E N T

TEBBUTT, A.J.A.

The factual background to this appeal is common cause. It is this.

In the early part of this year, there was considerable unrest in Lesotho. In January and again in April warring factions within the army clashed violently. The unrest caused by these clashes which apparently had their origin in demands for pay increases, spread to the police and the prison services. On 10th May, 1994 the police went on strike demanding a 60% pay increase and on 11th May, 1964 the prison warders also declared that they were on strike, demanding a pay increase as well. What occurred on that day appears from an affidavit filed by the Superintendent of Prisons and the officer commanding the Maseru Central Prison, one Moloko Leqele, in the proceedings in the Court a quo. On that day the Deputy Director of Prisons went to the Central Prison to attempt to negotiate a settlement of the prison warders' grievances. After lengthy discussions during which he told them that their strike was illegal - police, prison officials and public servants not being permitted to strike if they have grievances - the prison warders told the Deputy Director that they would carry out their normal duties except that :

(i) they would not allow visitors to enter the prison premises,

(ii) they would not escort prisoners to the courts of law, and

(iii) they would not allow prisoners to go out for labour.

At about 15.00 hrs on 11th May, 1994 a riot broke out among the awaiting trial prisoners. Shots had to be fired to restore order and certain of the prisoners sustained injuries for which 24 of them had to receive hospital treatment.

On 11th May,1964 Mr. Phoofolo, who appeared for the appellant in this Court and who is the president of the appellant, went to court to defend one of his clients and found that the latter had not been brought to court. The courts were, in any event, closed, the striking police having seized the keys. On 12th May, 1994, Mr. Phoofolo went to the Central Prison to consult with certain of his clients where he was confronted by a sign which read :

> "No services are being offered from 11th May, 1994".

He was denied access to the prisoners and could find out no information as to their welfare. No prisoners were brought to court from 11th May to 20th May, 1964. Relatives and other visitors were also not allowed to visit prisoners in the Central Prison. The same situation prevailed in the prisons throughout the country.

On 23rd May, 1994 following a meeting on 20th May, 1994 of the executive of the appellant, an application was brought as a matter of urgency by the appellant for the issue of a rule nisi calling on the respondents to show cause why an order should not be granted :

(a) declaring the further detention of awaiting trial prisoners in Lesotho's ten gaols who ought to have appeared for further remand from 11th May, 1994, illegal and that they be released forthwith;

(b) declaring the failure and/or refusal of the prison officers to bring prisoners to court for their trials illegal as being a violation of their rights to a fair hearing within a reasonable time;

(c) declaring as illegal the refusal of the prison officers to permit awaiting trial prisoners their normal visits by civilian from outside.

Mr. Phoofolo testified to the founding affidavit in support of the application as president of the appellant. He said he was concerned that "prisoners and victims of crime were being denied justice and the prisoners' constitutional rights were being violated". He also annexed two affidavits by the wife, one Limakatso Chaka, of an awaiting trial prisoner and by the mother, one 'Mamotuba Lerotholi, of another awaiting trial prisoner to say that they were being denied access to their relatives by the prison

officers and that they were concerned about the prisoners' welfare.

The matter came before Maqutu J. in the High Court on 30th May, 1994 who mero motu added the last mentioned two deponents as parties to the proceedings as second and third applicants respectively. The learned judge on the same day dismissed the application of the Lesotho Human Rights Alert Group, whom he had designated as first applicant, with costs. He reserved judgment on the application of the second and third applicants i.e. the two relatives whom he had mero motu joined as applicants to 14th June, 1994 stating that he would also then give his reasons for dismissing the first applicant's application. He also dismissed with costs an application by respondents that the first applicant provides security for costs.

The first applicant now comes on appeal to this court against the dismissal of its application. There is no cross appeal in regard to the security for costs application and I need say no more about it.

As to the so-called applications by second and third applicants, the learned judge made the following finding:

> "Events have since moved quickly towards the resolution of the strikes. The police

> strike ended on the 1st June, 1994. The prison warders' strike ended two days later. There is, therefore, no need to pursue the matter further .... The declaratory order which is impliedly sought by second and third respondent (sic, the learned judge obviously meaning second and third applicants) is refused because it is no more necessary. There is no order as to costs in respect of this portion of the application."

I have grave misgivings about the joinder of the two relatives as applicants mero motu by the learned judge. There was no application by them to be joined, nor does it appear anywhere on the record that they were consulted about being joined. It also does not appear that they acquiesced in being joined. The learned judge's reasoning for joining them reads as follows:

> "The second and third applicants as close relatives had in my view a title to sue and a specific interest of their own in what was happening to the prisoners and because of their right to have access to the detainees, therefore they were joined mero motu by the Court as respondents (The learned judge obviously meant "as applicants"). There was no point in dismissing this application because it had been brought by the wrong person only to have it brought, within hours by second and third respondents (again, the learned judge obviously meant "applicants")

It may well be necessary to join parties as defendants where the court's orders may affect them or their rights but the position is different in regard to plaintiffs and applicants. The joining of a party carries far-reaching consequences for such party. It may involve him in the protraction of the proceedings

due to his having been joined, with consequent costs, it may involve his having to bring further affidavits in motion proceedings or further evidence in a trial and, always, it involves him in the risk of having to face an order as to costs. In the circumstances, unless the party applies to be joined or, with full appreciation for the consequences he may face, agrees to be joined, a court should be hesitant mero motu join any party to such proceedings.

I turn then to this appeal. The learned judge delivered a long (39 typed-page), wide ranging judgment in which he philosophised on a variety of issues which had, in the main, only peripheral relevance to the issues before him. The reason for his dismissal of the first applicant's application is, however, the short and simple one of a lack of locus standi on the part of the applicant (as I shall for convenience herein refer to the Lesotho Human Rights Alert Group) to bring the application it did. This is also the sole ground of appeal, which reads as follows:

> "The learned judge a quo misdirected himself by deciding that the appellant has no locus standi in judicio to institute the proceedings on behalf of the prisoners, particularly in view of the fact that they had no access to relatives or lawyers for assistance."

In my view, the learned judge was quite correct. My reasons for so concluding are these

The applicant in the court a quo was established as a "neutral non-partisan body" with objectives which may be summarised as the monitoring, promoting, preserving and protecting of human rights standards in Lesotho. One of the powers of its Executive Board as set out in its constitution was to institute, on behalf of and/or defend legal proceedings against the Group and its members, or any other individual whose human rights have been violated. It was in terms of this latter power that it sought to bring its application on behalf of the prisoners. It is common cause that none of the prisoners was a member of the applicant.

It is well-recognised that the Roman Law "actio popularis" became obsolete in Holland more than four centuries ago, having not been recognised since 1578 as part of the Roman-Dutch Law, which is the common law of Lesotho as it is in South Africa. In South Africa from as far back as 1910 it has been held that the right of a private person, or association of persons, is limited to prosecuting actions in his or its own interest and he or it has no title to institute them in the interest of the public. (see Dalrymple v. Colonial Treasurer 1910 T.S. 372; Wood

and Others v. Ondangwa Tribal Authority and Another 1975(2) S.A. 294 at 305F - 306G; Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) and Another v. Muslim Judicial Council (Cape) and Others 1983(4) S.A. 850(C). In an application de libero homine exhibendo, however, which is part of the Roman-Dutch Law, the South African courts have held that, where the liberty of a person is at stake, the locus standi of a person who brings an application or action on behalf of a detained person should not be narrowly construed but, on the contrary, should be widely construed because the illegal deprivation of liberty is a threat to the very foundation of a society based on law and order (see Wood's case supra at 310F - G). Persons other than the detainee could thus bring an action for his release on the detainee's behalf.

The applicant would be allowed to act on behalf of the detained person where he could satisfy the court that the detained person was not in a position to make the application himself. The Court would also have to be satisfied that the detained person would have made the application himself if it had been in his power to do so. In the present case I will accept, without so deciding, that those requirements have been met. It is, however, only the exceptional case where the liberty of an individual is involved, that the general rule is relaxed to allow an action to be

brought by one person who has no direct and substantial interest in the litigation on behalf of another (see Wood's case supra; AAIL v. Muslim Judicial Council supra at 864 F). In the present case the prisoners were not being unlawfully detained nor is this an instance where the liberty of the individuals were involved save in the sense that they were not being timeously brought to the courts for their trials to be heard. I am, however, prepared to accept that their rights to a timeous trial, to see visitors and to be allowed to work were being violated and that the question of the locus standi of those who might seek on their behalf, to protect those rights should not be narrowly construed. It is, however, necessary in my view that such applicants must have a link or relationship with the person concerned, which may be that of a relative or personal friend or arise by reason of what was described by Rumpff C.J in Wood's case at 312H, as "an agreement express or implied, relating to a matter of common interest. I am thinking here of a partnership, or a society, or a church, or a political party. Any member of such a society or body would, in my view, have an interest in the personal liberty of a co-member".

The present applicant's objectives are without doubt praiseworthy and, having regard to the

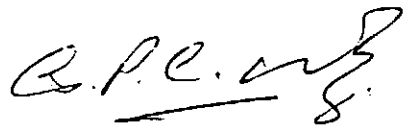
exigencies of modern-day society, it fulfils a very necessary function within that society. Its desire to act on behalf of the prisoners was also undoubtedly laudable. To extend to a body such as the applicant, the right to bring actions on behalf of persons unconnected with it and who have no link direct or indirect with it would, however, in my view, in law be extending the exceptional relaxation of the general rule to the liberty of an individual beyond what was intended in regard to such matters in Wood's case. It would be akin to a revival of the "actio popularis" which, as I have said, has been no part of our law for over four centuries. I, therefore, agree with Maqutu J. that the applicant did not have the necessary locus standi to bring the application it did and that he was correct in dismissing it, with costs.

It follows that this appeal fails and is dismissed, with costs.

P.H. TEBBUTT
ACTING JUDGE OF APPEAL

I agree :

J.H. STEYN
ACTING PRESIDENT



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I agree:

G.P.C. KOTZE
JUDGE OF APPEAL

Delivered at Maseru, this 28th day of July, 1994.