CIV/APN/180/89

IN THE HIGH COURT OF LESOTHO

In the matter between:

THE HONOURABLE MINISTER E.R. SEKHONYANA	APPLICANT
AND	
LESOTHO EVANGELICAL CHURCH	1ST RESPONDENT
THABO LESEHE	2ND RESPONDENT
A.B. THOAHLANE	3RD RESPONDENT
MORIJA PRINTING WORKS	4TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu on the 14th day of October, 1994.

On the 3rd August, 1989, Mr. Justice B.K. Molai made the following Interim Order:

That the *Rule Nisi* be issued returnable on the 21st August, 1989 calling upon the Respondents to show cause why:

"(a) The Respondents should not be restrained, and/or interdicted, forthwith from printing, publishing and distributing articles in the "LESELINYANA LA LESOTHO", which are intended to impair the appli-

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cant's reputation, dignity, fair name, and fame until finalization of an action to be instituted against the Respondents for damages;

(b) The Respondents should not be ordered to pay the costs of this application;

(c) The Applicant is hereby ordered to institute the contemplated action for damages within Thirty (30) days from the 3rd August, 1989 failing which this Order will not be effective;

(d) Order 1(a) operates with an immediate effect."

By the 7th August, 1989, the Interim Order had been served and all affidavits required for the ventilation of the matter had been filed of record by 10th October, 1989. Consequently the matter was ready for hearing. As an urgent matter, it ought therefore to have been set down for hearing. It was only set down on 27th February, 1990.

Molai J. had ordered that summons be issued within 30 days of the issuing of the Interim Order. Molai J's interim order of 3rd August, 1989 as recorded by the Registrar is as follows:-

"Application in the Notice of Motion subject to the condition that the applicant institute the contemplated action within 30 days from today. Return date fixed as 21/08/89."

By some misfortune summons were issued after the 30 days that Mr. Justice Molai had ordered. As the Respondents have not raised any objection to these late summons I will not take the view I might have taken. I must however state that Court order cannot just be overlooked. The fact that the Notice of Set down of the so-called urgent application was issued more than four years after it should have been is cause for concern.

The Court had a great shortage of judges but even so for an urgent application to be heard after full five years makes the term "urgent" to lose meaning.

On the 21st September, 1994, when this matter came before Court, the matter was postponed to the 29th September, 1994.

This Applicant in 1989 was the Minister of Finance in the Government of Lesotho.

Morija Printing Press, cited as the Fourth Respondent, is

owned by the First Respondent the Lesotho Evangelical Church. This fact is admitted by First Respondent which has a legal persona as a *universitatis*. What seem to be denied is that Fourth Respondent is a firm. That means Fourth Respondent has no legal persona. This fact Applicant is not in a position to deny. There seems also to be no real dispute that Third Respondent was not acting editor of "Leselinyana" although applicant made that allegation. Second Respondent admits he is the Editor of the "Leselinyana La Lesotho".

It seems therefore that First and Second Respondent have been correctly sued in these proceedings.

Second Respondent, the Editor of "Leselinyana La Lesotho" admits that he caused to be published in that newspaper the Article marked Annexure "NM1". Applicant says this article is defamatory. The publication is in Sesotho and has been translated into English by applicant who is not a sworn translator. Consequently Second Respondent challenges the accuracy of the translation.

My mother tongue is Sesotho a common occurrence in Lesotho these days when Basotho are now judges. I can therefore evaluate the translation. Having gone through it, I can say without

hesitation that it is better than the translations of many of our High Court sworn interpreters. It is certainly not a perfect translation, but it is substantially fair and accurate.

Applicant has also annexed to his application annexure "NM2" which is summons commencing an action before this Court in CIV/T/111/88. In that action Applicant claims M350,000-00 as damages because Second Respondent has published defamatory words about Applicant. In that action Second Defendant is sued along with Mr. Hae Phoofolo and the Newspaper "Leselinyana La Lesotho".

In both annexures "NM1" and "NM2" Mr. Hae Phoofolo is the source of the matter that Applicant complains about. In both cases Second Respondent has published matter that he extracted from other newspapers. In "NM1" Second Respondent has quoted from "Weekly Mail" and has inserted a photograph of Mr. Hae Phoofolo. In "NM2", Second Respondent has published the printed version of what "Moeletsi Oa Basotho" published.

The interim order granted by Molai J restrained Respondents from

> "printing, publishing and distributing articles in the *Leselinyana la Basotho* which are intended to impair

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applicant's reputation, dignity, fair name, fame until the finalisation of the action to be instituted against them."

Second Respondent admits publishing the following about Applicant:

1. 15th January, 1988 and 29th January, 1988 issue of "Leselinyana La Lesotho"

"1st Defendant (Mr. Hae Phoofolo) in his discussion with "Moeletsi Oa Basotho" states that he is lodging an appeal to the High Court because he was convicted on suspicion but not the truth following the Evidence of Minister of Finance Mr. E.R. Sekhonyana which evidence is false "This big fish say that he will use money belonging to the people to fix me while I will remain with nothing but with only my hands in front, which thing did really happen.

"We the people who used to hold positions for these big fishes we know their behaviour and their bad habit for many years. After soldiers had overthrown the Government we were happy after having heard that there will be a Commission of Inquiry in connection with the money and property that just disappeared. I HAE

PHOOFOLO there was an enquiry against me although there was no money I helped myself to. I have no hotel, special motor vehicle or even a beautiful house.

"Blessed are those whose skeletons are hidden and locked in the cupboard, as any query concerning them is not in the public interest...." It would appear in Lesotho today there are people who used to misuse their powers and to defend their positions and those of their friends on the other hand they blame other people."

Plaintiff's Declaration in CIV/T/111/88.

2. One and a half years later Second Respondent published "NM1" in "Leselinyana La Lesotho" of 28th July, 1989 which reads as follows:-

APPEAL BY HAE PHOOFOLO

"The long awaited Court of appeal case whereby MR HAE PHOOFOLO was accused of embezzling national funds was heard on the 24th July, 1989 (Weekly Mail of 14.07.89). One MR. MZIMKULU MALUNGA reported to the Weekly Mail that, that Newspaper

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was in possession of documents showing that BENCO, a Company which had a big Building Construction contract such as LESOTHO SUN, invested huge sums of money in SWISS BANK with the assistance of Minister of Finance, RETS'ELISITSOE SEKHONYANA.

"The said documents indicate that in February, 1981, an amount of M2 MILLION was again invested having been released by the Minister. In August, 1981 BENCO stopped operations due to lack of funds. Money was borrowed from the Republic of South Africa in order to pay Civil Servants.

"The Minister E.R. SEKHONYANA according to the documents was removed from portfolio of Ministry of Finance to Ministry of Interior (inside the Country)

"This corruption scandal has now been revealed after Seven (7) years! The Military Government once promised to launch investigations into scandals committed by Civil Servants - up to now, no outcome.

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"The Military Government re-instated the Minister E.R. SEKHONYANA to the Ministry of Finance, while action was taken against HAE PHOOFOLO. He was dismissed from employment in 1987 following the findings of the commission recommended by the Minister.

"PHOOFOLO approved an application by MALIBAMATS'O MINING COMPANY to invest the amount of M10 MILLION in Lesotho in mineral exploration and crush stones. It is this amount of money which the Minister is demanding from PHOOFOLO in that this Company has no lawful Licence.

"PHOOFOLO defended himself by saying that he was not the one responsible for granting licences. However, he was found guilty and dismissed. Another amount of money being demanded from PHOOFOLO is the one he received from his Family friend in ENGLAND for the purpose of erecting his Father's tomb stone. His request was that he (the Minister) should help him in transferring the said money to Lesotho.

> "These are the very facts for which PHOOFOLO noted an appeal when he was found guilty by the High Court."

Applicant in a nut-shell says Respondents and the "Leselinyana La Lesotho" are on a campaign to impair his good name, character and adds:

> "I further submit with respect that this Honourable Court can interdict the Respondents from continuing to advertise defamatory statements in the "Leselinyana" papers when such publications have continued to cause me irreparable injury to my character as a person and also in my capacity as the public figure holding position of trust as Minister of Finance."

I was taken aback when Second Respondent said at paragraphs 4, 5 and 6 of his Answering Affidavit that the translation of "NM1" is totally inaccurate. I have already said it is fair, complete and reasonably accurate. Second Respondent says no greed corruption and financial irregularities can be inferred from "NM1". Second Respondent also denies "NM1" accused Applicant abuse of power as Minister of Finance. I disagree with Second Respondent, in my view Applicant has drawn the correct

conclusion namely that Second Respondent is accusing him of greed, corruption, financial irregularities and misuse of power as Minister of Finance.

In the alternative Second Respondent defends himself by saying:

> "I further wish to submit that the Order sought by the applicant cannot be supported in law. The Applicant is a person in the public office, and members of the community which he serves will always be interested to know of his activities concerning his office. I further wish to submit that Applicant cannot obtain an interdict against the newspaper for the simple reason that articles that may be published will affect his dignity and standing in the eyes of the public. I submit that people in the position of applicant will always face the risk of their standing being questioned by their alleged conducts, and charges against their conducts, and charges against their character can only be culpable if they are found to be false... applicant is therefore not entitled to the interdict because the interdict will silence the press to publish material which will always and or sometimes be

in the interest of the public."

In the case of *Heilbron v Blignaut* 1931 WLD 167 at 169 Greenberg J. was faced with an application for an interdict directed against an apprehension of publication of a defamatory article, he said of Applicant:-

> "The result is that if the injury sought to be restrained is said to be defamation, then he is not entitled to intervention of the Court by way of interdict, unless it is clear that the defendant has no defence. Thus if the defendant sets up truth and public benefit, the Court is not entitled to disregard his statement on oath to that effect, because, if the statement were true, it would be a defence, and the basis of a claim for an interdict is that an actionable wrong, i.e. conduct for which there is no defence in law, is about to be committed."

Does Second Respondent's affidavit as a whole and the above passage claim what has been published or is about to be published is the truth?

The problem I have with Applicant's affidavit is that he does not specifically emphasise the falsity of what Second Respondent has published. The only thing he denies specifically is that he was ever transferred to the Ministry of Interior. This falsity of allegations might be inferred from what Applicant says at page seven of his affidavit i.e.

"apart from the defamatory meaning of the article as is set out above, it carries the additional sting that I am not a law abiding citizen, without moral fibre and not worthy of position of trust. At all relevant times and at present I have been a Minister of Finance of Lesotho, requiring the highest integrity and I am a well known public figure in Lesotho and abroad, as a result of the said defamation has caused the public not to believe that I deserve the position of Minister of Finance."

In reply Second Respondent after challenging the accuracy of the translation says:

"Applicant is a person in public office, and members of the community which he serves will always be interested to know his activities concerning his office."

From this it can in the same way be inferred from these words that Second Respondent believes the allegations of Mr. Hae Phoofolo against Applicant are true.

In *Buthelezi v Poorter & Ors.* 1974 (4) SA 831 at pages 836

and 837 the Court was not impressed with the fact that Respondent claimed its "information comes from sources close to the banned person." Cotzee J. felt setting up a defence was not enough. Respondent should be in possession of the information,

> "it is not sufficient for a person who clearly does not have personal knowledge of all the facts on which he must perforce rely to establish at the trial that what is *prima facie* an actionable injury did not occur, merely to say he will be able to substantiate in detail the facts without giving any evidence whatsoever what the evidence is."

In his case Mr. Hae Phoofolo is the disclosed informant in "NM2" and "NM1". We cannot at this stage determine whether or not Mr. Hae Phoofolo is telling the truth. If what he says about the Minister of Finance concerning the illegal ways he deals with public moneys could be true, that *prima facie* must be in the public interest. The words of Hoexter J. in *Fayd'herbe v Samnit* 1977 (3) SA 711 at 716F fit this case where he says,

> "It seems to me, however, that applicant has established that the respondent has defamed her, any further inquiry by this Court into the possible existence (and prospects of success) of one or more defences to the action of defamation arises only if respondent on oath says such a defence is available to him and that he proposes to set it up."

The Second Respondent has on oath said in the articles he

published in "Leselinyana", he was informing the public about the activities of applicant as a person holding public office.

The next problem Applicant has is that raised by *Setlogelo v Setlogelo* 1914 AD 221 at 227 where an application for an interdict is said to be appropriate only where there is no other satisfactory remedy. What Mr. Hae Phoofolo is clamouring for is "NM2" and "NM1" is that a Commission of Inquiry be held to investigate his allegations against applicant as Minister of finance and generally to look into the activities of Applicant whom he accused of corruption. This is gleaned from the following:

1. "NM2" issues of "Leselinyana La Lesotho" dated 15th and 29th January, 1988 at paragraph 6 and 7 of Plaintiff's Declaration of CIV/T/111/88 where Mr. Hae Phoofolo says:

   "After soldiers had overthrown the Government we were happy after hearing that there will be a Commission of Inquiry in connection with money and property that has disappeared. I Hae Phoofolo had an inquiry against me although there was no money I help myself to.
   "Blessed are those whose skeletons are hidden and

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locked in their cupboards as any query concerning their wrongs would not be in the public interest."

Applicant interprets this to mean that money and property that disappeared did so because of Applicant. Applicant misused public funds to acquire luxury items and that Applicant uses the instruments of the law to protect his corruption.

2. "NM1" "Leselinyana La Lesotho" issue dated 28th July, 1989 published the following:-

> "The Minister E.R. Sekhonyana according to documents was removed from the portfolio of Ministry of Finance to the Ministry of Interior (inside the country). This corruption scandal has been revealed after seven years. The Military Government once promised to launch investigations into scandals committed by public servants - up to now, no outcome. The Military Government reinstated the Minister E.R. Sekhonyana to Finance..."

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It would seem clearly that a Commission of Inquiry that Mr. Hae Phoofolo clamoured for would establish the truth far better than this interim interdict that Applicant has moved the Court to grant. It does not seem the balance of convenience favours the granting of this interim interdict when a far superior and effective alternative remedy exists.

The other difficulty I have with this application for an interim interdict by Applicant is that it is a political attack of Applicant and the Military Government for not holding a Commission of Inquiry into the activities of Applicant who is the Military Government's Minister of Finance. The defamatory matter is what should be the terms of reference of what Mr. Hae Phoofolo wants the Commission of Inquiry to look into.

In the case of *Minister of Justice of SA v SA Associated Newspapers Ltd.* 1979 (3) 466 at 476 AC where Van Zijl JP with Van Winsen concurring said:

> "The Minister says the second report is defamatory because the two reports read together imply that not only he and the other members of the Cabinet fought an election dishonestly by suppressing information on the *Citizen* but that also after that he was careful to prevent facts about the *Citizen* from leaking out. Accepting the Minister's assessment of these two reports at its high water mark it still means that the words complained of concern the Minister and the

> Cabinet's behaviour in respect of party policy. A decision to finance the publication of the *Citizen* and to suppress the fact are matters of policy. Matters of Government policy as has been stated above, may be freely criticised and condemned even if such criticism and condemnation is unfounded and unfair. It is not defamatory unless improper motives or dishonest conduct is imputed to the person complaining..."

It seems to me Mr. Hae Phoofolo and Second Respondent of the "Leselinyana La Lesotho" who are Mr. Phoofolo's medium cannot be just stopped. It is a matter of policy for the Military Government to have neglected to have a Commission of Inquiry against Applicant when it did not hesitate to hold one against Mr. Hae Phoofolo. It is just as much a matter of policy for the Government to have returned Applicant to the Ministry of Finance without any investigation and then stubbornly refuse to investigate <u>all</u> allegations against Applicant.

Mr. Hae Phoofolo is aggrieved by the discriminatory policy of Government which investigates allegations against small men like him through Commissions of Inquiry but not against Ministers of the Crown. The press in giving Mr. Hae Phoofolo a platform is joining Mr. Phoofolo's lone effort and turning it into a national crusade against injustice. No one can dispute that this is the duty of the press, nay, the duty of any public-spirited citizen. The thrust of these articles emanating from Mr. Hae

Phoofolo is not against applicant alone but also against the Government of the day of which Applicant is part.

The balance of convenience is in favour of allowing the process whereby agitation for a Commission of Inquiry is allowed to continue. The reason being that a Commission of Inquiry would have access to all facts both within the Ministry of Finance and out of it. In this way both the Government's and Applicant's name would be cleared if Mr. Phoofolo's allegations turn out to be false. In my view Applicant should have joined Mr. Hae Phoofolo in demanding a Commission of Inquiry. To stop the campaign for the holding of a Commission of Inquiry through an application of this kind does not serve both the public interest and Applicant's own interest.

In dealing with defamation we are dealing with communication. For communication to take place, there must be the communicator, the message, the medium and the audience. Mr. Hae Phoofolo who is the originator of the message is the communicator, his message is the defamatory matter that is the subject of this application. The medium is the newspaper "Leselinyana La lesotho" owned by First Respondent and run by Second Respondent. The audience are the readers. Publication is central to the delict of defamation. That is the reason the newspaper which is

medium of publication together with the originator of the defamatory matter are jointly liable. The reason being that had the originator of the message kept it to himself there would have been no publication.

Our law does not have separate delicts of slander and libel. The reason being that whether the complainant's good name and character are impaired through the spoken or written word, man is the source or originator. The press, radio, television and *viva voce* communication are only the media through which what issues from a communicator is published. Consequently, the editor, proprietor, printer, publisher of a newspaper, journal or other document circulated (as media of publication) are liable for actionable defamatory statements contained therein. See Joubert, *The Law of South Africa*, Volume 7 Paragraph 27. The same principle applies to a news editor and proprietor of a radio or television station.

The press, radio and television do not only provide a media or platform for individual who have information to publish but have a duty in their own right to inform the public about what is going on. It is the duty of the press to give a platform for ventilation of grievances of individuals like Mr. Phoofolo to enable them to tackle powerful people such as the Ministers,

Government, multi-national corporations and other giants. Provided the press does this responsibly and fairly, it cannot be restrained. In *Voster v Strydpers Bpk*, 1973 (3) SA 482 Myburgh J. held defamatory matter may be published provided:

> "1. Defamatory matter is based on fact and comments are distinguishable from facts.
> 2. Comments are fair and just.
> 3. The facts must be complete.
> 4. The facts and the comments are in the public interest."

It is the duty of the press, radio and television to check whatever they publish in order to act responsibly and be fair to all sides.

It is clear therefore that a person who publishes a defamatory rumour cannot escape liability on the ground that he passed it on but does not endorse it. To repeat or re-publish a defamatory statement is the basis of liability. Colman J. in *Hassen v Post Newspaper Pty Ltd & Ors.*, 1965 (3) SA 562 at 565 A said:

> "It is well established that a publication can be actionable and defamatory even if the defendant has made it clear that he is merely repeating the averments of another and that he himself cannot vouch for its accuracy (see e.g. *Farrar v Madeley* 1913 CPD 888). Thus a newspaper cannot escape liability for

> damages merely because the defamatory matter published by it was put forward as no more than a repetition of a speech made at a political meeting, or a statement made to its reporter by some one."

In this case Second Respondent in "NM2" republished what originated from "Moeletsi Oa Basotho" while in "NM1" Second Respondent republished what originated from the "Weekly Mail". Second Respondent and of course First Respondent are liable on the basis that they are Mr. Hae Phoofolo's media and also because as commercial and professional publishers they also have liability in their own right. It was because of this independent liability of "Leselinyana La Lesotho" that I asked Mr. Matooane Counsel for Applicant whether Second Respondent is entitled to publish what comes from other newspapers without being in possession of the facts. Since Second respondent has a definite source (namely Mr. Hae Phoofolo) for the facts published I have already held that this publication cannot be dismissed as one for which there would not be a defence at the main defamation trial.

The position of Applicant under the law is a very difficult one because as de Villiers C.J. in *Hertzog v Ward*, 1912 AD 65 at 70 said:

> "It is the policy of the law on the one hand to protect the right of full and free discussion in

> matters of the public interest and on the other to protect the right which every person has to the maintenance of his reputation."

Indeed I would go so far as to say the courts have to recognise that the good name of men in public life is something that society should protect. Innes C.J. in *Botha v Pretoria Printing Works*, 1906 TS 710 at 715 put this as follows:

> "The public acts of public men are, of course matters of public interest, and criticism upon them does a great deal of good provided corrupt motives are not imputed. But the character of a public man is not only a precious possession to himself, but is a public asset.... I think the court should, by its attitude impress upon all concerned that attacks upon the private character of public men should not be lightly made... they must be justified."

This is not the only end of society, there is also the matter of press freedom and the good that comes from it. In *Voster v Strydpers Bpk En Andere*, 1973 (3) SA 482 at 485 H Myburgh J. emphasised that:

> "It is the right of every citizen to expose malpractice in the State or improper conduct on the part of public persons and comment thereon. Some decided cases even say it is the duty of the good citizen to do that. The comments will naturally be defamatory and can in certain circumstances constitute defamation." (See translation and the rubric of the case)

Whatever Courts do they must under the common law keep the public interest uppermost. *Section 18* of the *Human Rights Act* of 1983 which was the matrix that regulated this aspect of public and private life at the time provided:-

> "Everyone shall have the right to hold opinions without interference and the right to freedom of expression including the freedom to seek, receive and import information and ideas of all kinds subject to restrictions provided by law as are necessary for-
>
> (a) the respect of the rights or reputations of others; and
>
> (b) the protection of national security, ..."

The Court has a discretion to grant an interdict. In *Rivas v Premier (Tvl) Diamond Mining*, 1929 WLD 1 in dealing with balance of convenience among other things the Court has to consider whether:

1. An interdict appears to be a sensible remedy.
2. Whether the granting of the interdict will not be unnecessarily oppressive or will not interfere with someone's personal rights when there exists alternative remedies.

The difficulty of exercising the Court's discretion and the

uncertainty of a proper remedy is therefore apparent.

In *The Honourable Minister E.R. Sekhonyana v Mazenod Printing and Others*, CIV/APN/109/90 (Unreported) to which I was referred by Mr. Matooane, Counsel for Applicant, accusations of misappropriation of funds were levelled against Applicant. A similar application for an interdict was brought against Mazenod Printing Works and "Moeletsi Oa Basotho" who were the First and Second Respondents. The court was of the view that Respondents were withholding evidence from the Court. They did not in the Court's view set up a defence. Each case is judged on its own merits. It seems to me the truthfulness of defamatory statements cannot be determined in application proceedings, that is a matter for the trial court. Kheola J. (as he then was) correctly stated that:

> "The duty of the press is to scrutinise the actions of the Government and its Ministers and in the public interest to *bona fide* publish whatever is in the public interest, so that high moral standards can be maintained in high places."

The Court has to balance various interest, those of the applicant, those of the public, freedom of expression and freedom of the press to disseminate information responsibly. This is a case where the Court has to consider if in this case it would be

oppressive against other interests to grant the injunction that Applicant seeks. This has to be considered in conjunction with whether there are other remedies.

In this case I have already said a Commission of Inquiry that Mr. Hae Phoofolo and the Respondents are clamouring for would be a far better preliminary remedy than rushing to Court either by way of a temporary interdict or an action of damages. The reason being that all the internal evidence within government would be gone into. Such evidence would not be readily accessible to the respondents. From that internal inquiry the commission will then look into applicant's personal affairs, from there it might look into what exists in the country or is in foreign countries. After such an enquiry then judicial proceedings would follow with the full assurance that nothing was hidden. Applicant is also free to defend himself in the press, radio and television, before or after legal proceedings are instituted.

It is true that not even a claim of damages ever clears a person's good name as it is notionally expected to do. But for politicians this is a risk they take when they enter politics. The courts cannot over-protect politicians. Certainly criminal proceedings ought not to be brought against newspaper editors merely because they published confidential information about

Ministers to draw the attention of Government and the general public to abuses.

In Lesotho during 1988 the Government of the day used the state machine including the Office of the Director of Public Prosecutions to do such a thing. It sacrificed the public interest and the right of free speech and sacrificed them to protection reputations of Ministers by abusing the concept of national security. In *Johnny wa ka Maseko v Attorney General and Others*, C of A (CIV) No.27 of 1988 the Appellant was charged with undermining national security by publishing defamatory matter about the Minister of Finance. Ackermann J.A. held:

> "The *bona fide* attempt to by a newspaper editor to disclose, through his newspaper, the existence of corruption or irregularity in public administration and the fact that a Minister of State is involved in or connected with such corruption cannot possibly, in my view, constitute subversive activity, if the editor *bona fide*, believes in the truth of this assertion."

It will be observed from the *Johnny wa ka Maseko case* the Courts in the support of press freedom have had to stop criminal proceedings under the guise of national security from being misused in an attempt to protect Ministers from legitimate criticism by the press. Such attempts that were made by the

State to classify disclosures of Ministerial departures from good governance as subversive activity (by the press) have been curbed. The Courts have a duty to see that the public interest is promoted by the press and the State through remissiveness does not harm it by using national security as a veil to protect irregularities.

The position of the Common Law of Lesotho in respect of people in the position of Applicant is succinctly put in the case of *Mackay v Phillip*, (1830) 1 Mez 455 at 463 in the following words:

> "The acts imputed to him... while in the execution of this public office...were of such nature as, if committed by plaintiff, to make it the right, nay the duty, of every honest man to publish such misconduct of plaintiff, and through the powerful medium of the press rouse the public voice..."

Cullinan C.J. (as he then was) dealt with interim interdicts *pendente lite* and avoidance of irreparable harm to an applicant. In *Morena E.R. Sekhonyana v Mike Pitso and Another*, CIV/APN/381/-88 (unreported) said:

> "As I have indicated earlier, the case must be rare whereupon interlocutory application, the right is beyond dispute... What the court is concerned with on affidavit and, on the basis of such evidence, is

> whether plaintiff has made out a *prima facie* case though open to doubt."

As already stated, Applicant in his particular case does not have to prevail over other interests in society. His affidavit did not even make clear and firm denials of the allegations which were the basis of Mr. Hae Phoofolo's and the press demand for a Commission of Inquiry.

The only question left is whether the Respondents are men of straw from whom no damages can be got at the end of the day. In *Cleghorn & Harris v National Union of Distributive Workers*, 1940 CPD 409 at 419 Howes J. dealing with the question of irreparable harm (in a temporary interdict) that has to be weighed against the possibility of a claim of damages with reference to a man of straw said:

> "such defamation could never be checked or damage repaired if the perpetrator, possibly a man of straw, had merely to raise the defence of justification and the public interest in order to continue publication until a trial is heard."

In this case the First and Second Respondents, the publishers of *Leselinyana La Lesotho*" are not said to be men of straw in the applicant's affidavit. The pertinent question is therefore why

should press freedom and the right to inform the public be limited when an action for damages might provide redress?

Applicant's application is in many respects similar to that of *Winnie Mandela v Xoliswa Falata* Case Number 13181/94 (unreported) of the Transvaal Provincial Division. In that case a Deputy Minister was seeking a restraining order to stop the publication of defamatory matter by Respondent at a press conference. Van Schalkwyk J. held:

> "There may be a few exceptions but in general no politician should be permitted to silence his or her critics. It is a matter of the most fundamental importance that such criticism should be free, open, robust and even unrestrained. This is so because of the inordinate power and influence wielded by politicians, and the seductive influence which these attributes have upon corrupt men and women. The most appalling crimes have been committed by politicians because their baseness and perversity was hidden from public scrutiny. ... In this case I believe the private interest must yield to the larger public one. ..."

In the *Winnie Mandela* case the fact that Respondent was a man of straw was not allowed to override the greater public interest. Indeed before the law we are always told men are equal. The Court did not unduly entertain the suggestion that Respondent was a man of straw. In this case Applicant is battling with the press which belong to a Church which ought

normally to have the means to pay damages.

Mr. Mathe for Respondents (dealing with justification for publishing defamtory matter) challenged the fact that the Interim Order completely barred press freedom for "Leselinyana La Lesotho" insofar as matters relating to applicant are concerned. He said Respondents felt the Interim Order has been very oppressive on his clients. He felt the five years that this *Rule* has operated has been an inconvenience that cannot be compensated for even by an appropriate Order as to costs. I agree with Mr. Mathe that this interim Order is framed in terms that are too broad.

The greatest difficulty I have is the nature of the Order that is being asked for. This Court ought not to grant an order that is clearly wrong. Applicant must be helped, but this help must be given within the law. Applicant has asked for an order:

> "Restraining and/or interdicting forthwith the Respondents from printing, publishing and distributing articles in "Leselinyana La Lesotho" which are intended to impair the applicant's reputation, dignity, his fair name, fame until the finalisation of the action to be instituted against them"

/...

What applicant asks the Court to restrain Respondents from doing, is precisely what every honest man has a right and duty to publish about any politician or person holding high public offices,

> "to expose malpractices or improper conduct and disapproval thereof by a right minded community serves as a method to keep society free from corruption and dishonesty. This right and duty is particularly the task of the public press. *Voster v Strydpers Bpk En Ander*, 1973 (3) SA 482 at 4854 (See Translation and the rubric of the case).

Matter of this kind that has to be published in the public interest must of necessity impair the reputation, dignity, fair name and fame of the person on the receiving end of that publication.

The other objection to this prayer is that it muzzles the press completely in so far as any past and future articles on different misdeeds that Applicant might have or would commit in the future. That is unacceptable because it harms the public interest when the law in respect of defamation balances the interests of Applicant and those of society as a whole.

/...

In the case of *Morena E.R. Sekhonyana v Mamello Morrison and Another*, CIV/APN/50/93 (unreported) this Court concluded:

> "The Order was, as I have said, too broad because defamatory matter can be published provided there is justification as a result of which it becomes lawful. As already stated, this would be because the publisher claims and shows that he is doing it for the public benefit.... This interim order, as framed, restrains first Respondent from doing what the law permits. ... This has the effect of restraining lawful activity."

I therefore discharge this *Rule Nisi*.

On the question of costs I order that Respondents be awarded three quarters of the taxed costs. The reason for denying Respondents a quarter of the costs is that they denied the clear defamatory nature of "NM1" and only raised the defence of public interest in the alternative.

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W.C.M. MAQUTU
JUDGE

For Applicant : Mr. T. Matooane
For Respondents : Mr. M. Mathe