CIV/APN/391/93

IN THE HIGH COURT OF LESOTHO

In the matter between:

MPALI-PALI LEROTHOLI — APPLICANT

AND

ATTORNEY-GENERAL — RESPONDENT

REASONS FOR JUDGMENT

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

On the 7th October, 1994, the registrar told me she had a letter from the Attorney-General asking me for reasons for judgment.

It was also disclosed for the first time that an appeal had been noted and that the Attorney-General could not prepare a record until he had my reasons for judgment.

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Applicant made an application order in the following terms:

"1. Extending the period of six (6) months pursuant to section 60 of the Police Order No.26 of 1971 as amended.

2. Directing the Respondent to pay the costs of this application only in the event of opposition.

3. Granting the applicant such further and/or alternative relief as this Honourable Court may find fit."

In the past such applications were rarely opposed precisely because the attitude of the Crown was "let right be done."

This application was made on the 5th August, 1993.

Applicant claims he was arrested on the 2nd May, 1990, assaulted and detained by the police and subsequently taken before a Magistrate on 29th May, 1990.

Apparently Accused was not remanded to custody. The case was remanded endlessly until in February 1992 when he was told not to come any more.

Applicant says he was not aware of the provision in the Police Order No.26 of 1971 which provides that the police should be sued within six months of the date of commission of the offence.

The Respondents deny the assault and say the action is time barred by the provision of the *Government and Proceedings and Contract Act* of 1965. They also oppose the extension of the period for issuing summons, perhaps because ignorance of the law is no excuse. This principle is applied with sensitivity by courts. It is applied to make sure existing law is respected and no excuses made unnecessarily. Courts do take ignorance of the law as an excuse for purposes of punishment.

Section 60 of the *Police Order No. 26* of 1971 (as amended) provides that actions against the police should be instituted within 6 months but the Court on good cause shown can extend the period if it is satisfied that applicant with good reasons has persuaded it that it

should extend the period.

It seems to me that at this stage I cannot go into the merits. I am satisfied Applicant could not bring proceedings in respect of his detention and malicious prosecution until criminal proceedings had been finalised or abandoned. This happened around February 1992. He says he was not aware of *Section 60* of the *Police Order* of 1971. I am satisfied he is telling the truth and to me that is a good enough reason.

In granting this application I was also conscious of the fact that *Sections 6* and *7* of the *constitution* that protect the personal liberty and freedom of movement had been violated. The *Constitution* being the supreme law I felt obliged to give it effect over laws that seem not to give much consideration of fundamental human rights and freedoms. I noted the particular *Police Order* gave me a discretion. This discretion I exercised in favour o liberty of the subject.

On the question of assault it seems the action could have been brought earlier, although on the face of things it is inseparable with the detention and malicious

prosecution. The assault took place in May 1990. The right to bring an action seems to have been lost through the running of the two year prescription which is found in *Section 6* of the *Government Proceedings and Contracts Act* of 1965. Yet *Section 22(1)* of the *Constitution* seems to be in conflict with the *Government Proceedings and Contract Act* of 1965. That being the case I was of the view that even the right of action in respect of the assault is not necessarily time barred. I also took into account the fact that the assault, detention and malicious prosecution are intertwined.

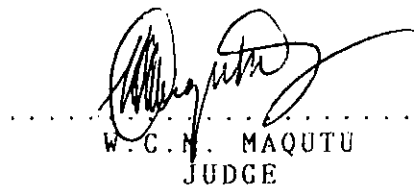
For guidance in respect of laws that collide with the Constitution reference should be made to cases of the U.S.A. In *Marbury v Madison* 1 Cranch 137 (1803) Marshall C.J. called the constitution the supreme law of the land to which other laws should yield. He further held that the Constitution like other laws should be interpreted by the courts of law. It will be observed that *Sections 5, 6* and *11* of the *Human Rights Act* of 1983 protects these rights except that in terms of *Section 3* the *Human Rights Act* of 1983 was subject to conditions previously laid by law. Before April 1993, the *Constitution* was not yet the supreme law which must be given effect to. This

application was dealt with within what I considered as the present human rights culture.

The view I take is that *ex facie* of the papers Applicant was subjected to an inhuman treatment by the police. This is contrary to *Section 8* of the *Constitution*, I felt insofar as the *Government Proceedings and Contracts Act* of 1965 denies Applicant a forum it should not prevailed over the *Constitution*.

I granted Applicant's application and extended the time within which to bring an action to 6th September, 1994 because the delay to hear this application was not of his making but rather one of the malfunctioning of our judicial process itself. There was no order as to costs.

As I considered the application an interlocutory one, I did not write a judgment nor did any party ask for it.



W.C.M. MAQUTU
JUDGE

For Applicant : Mr. Nathane
For the Crown : Mr. Mapetla