CIV/APN/256/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

AMANDUS MPITI TAOLE		APPLICANT
AND		
THE DEPUTY PRINCIPAL SECRETARY	1ST	DEFENDANT
MINISTRY OF INFORMATION & BROADCASTING	2ND	DEFENDANT
ATTORNEY GENERAL	3RD	DEFENDANT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 9th day of August, 1995.

On the 7th August, 1995, this matter was argued before me by Mr. *Phafane*, Counsel for Applicant and Mr. *Letsie*, Counsel for the Respondents.

At the conclusion of argument, I made the following order:-

"Application is dismissed with costs on the

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grounds that the Public Service Commission and not the First Respondent should have been sued or at least joined in these proceedings. Reasons for judgment to follow at 2.30 p.m. on the 9th August, 1995."

I explained that this was being done because I considered the matter as urgent and that it was in Applicant's interest to know the Court's decision to enable Applicant to assess his position and to take what further action he considers advisable.

This application was brought by the applicant on the 27th July, 1995. Applicant brought an *ex parte* application for an order in the following terms:

"1. That a *Rule Nisi* issue returnable on the date and time to be determined by this Honourable Court, calling upon the Respondents to show cause (if any) why:

a) The 1st Respondent shall not be restrained and interdicted from removing Applicant from his office in the Ministry of Information and Broadcasting without due process

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of the Law.

b) The Respondents shall not be interdicted and restrained from retiring Applicant from the civil service without due process of the Law.

c) The 1st Respondent's letter dated 21st July 1995 and contents thereof shall not be declared unlawful, null and void and of no legal force and effect.

d) The Rules as to service and process shall not be dispensed with.

e) The Respondents shall not be ordered to pay costs hereof.

f) The Applicant shall not be granted further and/or alternative relief.

2. That prayers 1 (a) (b) and (d) shall not operate with immediate effect as an Interim Order."

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It is now in my view settled law that orders should not be granted without hearing both parties unless special reasons for so doing exist. In *Republic Motors v Lytton Road Service Station* 1971(2) SA 516 at page 518 FH, Beck J correctly noted that:

> "The procedure of approaching the Court *ex parte* for relief...is somewhat lightly employed. Although the relief that is sought...is only temporary in nature, it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard and it is, to that extent a negation of the fundamental precept of *audi lateram partem*..."

Herbstein and Van Winsen in *Civil Practice of the Superior Courts of South Africa* 3rd Edition at page 59 says an order should only be granted without hearing the other side in an urgent matter if giving notice tot he other side "may precipitate the very harm that applicant is trying to forestall".

I took the view that an urgent application (even if on notice) may be dealt with speedily if the Court chooses to do so. Granting an order *ex parte* has not often led to

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the speedy hearing and determination of the matter. There are urgent matters for which a *rule nisi* has been issued that are two years old, and which keep on being postponed and the *rule nisi* extended. I took the view that this matter was urgent and dispensed of all rules and procedures that could delay its hearing. The result of these measures was that this application has been finalised within ten days.

As all parties are in Maseru, I directed that the Respondents be served. In view of the urgency of the matter I ordered that ordinary rules of Court be dispensed with. I also directed that all opposing and replying papers should have been filed by 2nd August, 1995. The matter was postponed to the 4th August, 1995 for the full hearing on the merits. Applicant's Counsel seemed satisfied with what the Court did because the whole matter would be dealt with expeditiously and consequently be finalised within seven days.

On the 4th august, 1995, I directed that heads of argument be filed as they had not been filed. I postponed the application to 2.30 p.m. on the 7th August, 1995.

Harms in his *Civil Procedure in the Supreme Court* S1

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at page 499 says the following about an interdict:

> "An interdict is an order of Court that the respondent must refrain from doing something or must do something. The first order is referred to as a prohibitory interdict and the second as a mandatory interdict."

Applicant is applying for both a prohibitory interdict and a declaratory order rolled into one. The interdict that is being sought is a final one. The reason being that it is, (if granted):

> "... granted in order to secure a permanent cessation of an unlawful course or conduct or state of affairs."—Erasmus *Superior Court Practice* E8-2.

There seems to be little doubt that Applicant had to take action if his rights were infringed. He previously brought CIV/APN/129/95 against the Principal Secretary for Information when he had purportedly retired him from the public service and Monapathi J had ordered that Applicant be reinstated to office in the Ministry of Information and Broadcasting from which Applicant had been unlawfully removed. If First Respondent in these proceedings had in defiance of the order of Monapathi J again retired Applicant from the Public Service, that would be contempt of

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Court. I would have expected contempt of Court proceedings to have been instituted.

Before me today, there is another application for an order restraining the Ministry of Information and Broadcasting from retiring applicant from the Public Service unlawfully. Should the same application be repeated over and over again?

First Respondent denies that he has retired Applicant from the Public Service. He says he was simply communicating the decision of the Public Service Commission to Applicant. First Respondent adds that if applicant wishes to challenge the decision of the Public Service Commission, Applicant must do so.

Applicant in his Replying Affidavit says the Public Service Commission does not communicate directly with the Public Servants. Applicant does not deal with First Respondent's submission that Applicant ought to challenge the decision of the Public Service Commission directly. If Applicant does not do so, the decision stands, something that Applicant does not want.

Section 136(11) of *the Constitution of Lesotho* says

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this about the Public Service Commission:-

> "The Commission shall, in the exercise of its function under the Constitution, not be subject to the direction or control of any other person or authority."

By this I understand that neither the Deputy Principal Secretary for Information and Broadcasting, the Minister, the Prime Minister or Government itself is responsible for its decisions. Therefore if it transgresses the law, it is directly answerable.

The role of the Public Service Commission has drastically changed from what it was in 1970. Until the coming into operation of the Constitution the present functions of the Public Service Commission were exercised by the Minister in Charge of the Public Service. The role of the Public Service Commission under the *Public Service Order No.21* of 1970 was an advisory one. Section 20(1) thereof provides:

> "There shall be a Public Service Commission which shall make recommendations in those cases in which this Order requires that the Commission is to be consulted concerning the exercise of the power to exercise the power to appoint persons to hold or act in the offices of the public service."

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An entirely different situation now obtains in under *The Constitution* because in terms of Section 137(1) of *The Constitution*:

> "...the power to appoint persons to hold or act in offices in the public service (including power to confirm appointments) the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons shall vest in the Public Service Commission."

It would seem therefore that Government cannot answer for what the Public Service Commission has done rightly or wrongly against Applicant. The Public Service Commission, under the Constitution, being "not subject to the direction or control of any other person or authority", must therefore be held accountable.

In the light of what I have said above, First Respondent cannot answer for what the Public Service Commission has done. Indeed although Applicant has brought this application against First Respondent, his own annexure "CC" dated 21st July, 1995 is clear. It states that First Respondent is merely passing on to the Applicant the decision of the Public Service Commission. How do I declare the letter dated 21st July, 1995 (Annexure "CC") null and void while the decision (of which Applicant is

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aware) still stands?

It seems to me this application is not in order in the form it has been brought. Applicant ought to reassess his position and try again. The fact that the Public Service Commission is not a party to these proceedings strikes me as a serious omission. This is particularly so because the letter of 21st July, 1995, (annexure "CC") left Applicant in no doubt as to whose decision it was that had aggrieved Applicant. Applicant has brought proceedings against the messenger and omitted haul before the Court the Public Service Commission, which had made the decision that is prejudicial to him.

At paragraph 17 of Applicant's founding affidavit, applicant says he pleaded with First Respondent as well as the Principal Secretary to give him a hearing. Nothing was directed to the Public Service Commission, which is the body that had taken the decision to retire Applicant. I do not understand why this was not done by Applicant.

I think it is necessary to deal briefly with the merits in order to show why I felt I could not, during argument, entertain (at that stage) the applicantion for joinder of the Public Service Commission that Applicant's

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Counsel attempted to make. Erasmus in *Supreme Court Practice* at page E8-5 dealing with requisites of final interdicts says:

> "Whether applicant has a right is a matter of substantive law; whether it is clearly established is a matter of evidence. In order to establish a clear right the applicant has to prove on a balance of probability the right he seeks to protect."

I therefore have to go over the merits in order to show why I consider the application as presently stated as unsatisfactory.

Applications are not meant for matters that are potentially contentious on the facts. The reason being that if it cannot be decided on papers, the application might, in terms of Rule 8(14) of the *High Court Rules* 1980 be dismissed with costs. Waiting for over 24 years before Applicant stated that he was born in December 1942 is suspect as the First Respondent has stated in his Opposing Affidavit. It is all the more so because when it was said, his retirement was imminent (because of the information he himself had given) he for the first time revealed to his immediate superior that he was born in December 1942.

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Applicant's averrment as to how he came to give 19th February, 1940 as his date of birth is not helpful in application proceedings. The reason being that an applicant stands or fall by what he said in his Founding Affidavit. Applicant says he thought this was his date of birth and he has now discovered that he was mistaken. Children (normally) are told when they were born. If Applicant had said he had been given wrong information which he readily believed, that would have been understandable. Unless Applicant gives further details, what he has said could not have persuaded a reasonable man. The question of date of birth is an essential part of the contract of employment in the public service. Altering this term of employment is a step that should be seriously and formally approached and cogent reasons given. Applicant was obliged to establish a clear right on this aspect in order for the Court to grant the interdict he sought. This (on the face of the papers as presently framed) Applicant had not done.

It is not helping Applicant's case that he is relying on a very brief photostat copy of Applicant's mother's affidavit. It was not meant for this application or drawn in order to persuade me of his date of birth. It was simply meant (so Applicant says) to quash a rumour of

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Applicant's impending retirement as the letter of 28th November 1994 shows. Even if this affidavit was an original, it is too short to be effective in a case such as this one. The law of Lesotho on this is succinctly put by Hoffmann and Zeffertt *The South African Law of Evidence* 4th Edition at page 390 where the learned authors state:

> "No evidence is ordinarily admissible to prove the contents of the document except the original document itself. This is traditionally regarded as the most important surviving remnants of the best evidence rule."

Section 17 of the *Evidence in Civil Proceedings Ordinance 72* of 1830 on best evidence remains the law of Lesotho. I do not therefore understand why Applicant has chosen to prove the most important element of his case (namely his date of birth) by producing before me a photostat copy. Section 17 clearly states that:

> "no evidence as to any such fact, matter or thing shall be admitted in any case in which it was in the power of the party who proposes to give such evidence to produce, or cause to be produced, better evidence as to such fact, matter or thing..."

Even if Applicant had sued the correct body in respect of

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his retirement, he would not have succeeded on the papers as they stand.

What is on record is that Applicant never took the formal step of correcting the records in the hands of Government concerning the date of birth that he had given when he was first employed. The letter of Applicant to the Principal Secretary, Ministry of Information and Broadcasting, dated 28th November, 1994, which has been annexed by First Respondent, is certainly not an attempt to correct records that he himself submitted to Government when he was first employed. He treated the information he himself gave as only a rumour. That letter reads:

> "Sir,
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> It has come to my notice that there is a rumour going around that I be retired. The rumour is quite false and baseless.
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> I attach hereto my mother's affidavit as to when and where I was born. This in law is the best evidence available...
>
> I request you therefore to quash the said

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rumour and to advise the Honourable Minister of the facts stated above...

I have not reached the compulsory retirement age.

Yours faithfully,

AMANDUS MPITI TAOLE"

It was for the Applicant to approach the appropriate authority and persuade it that he genuinely gave mistaken information about his date of birth when he was first appointed and asked that records be put straight. Memories about dates cannot always be relied upon, that is why baptismal certificates and birth certificates give useful back-up systems in proving dates of birth.

In the circumstances of this case, it was a dangerous over-simplification to say an affidavit made by Applicant's mother more than fifty two years after his alleged date of birth is unchallengeable. It does not follow that in applicant's circumstances an affidavit from his mother would necessarily be unchallengeable. To illustrate my point, I asked Counsel for Applicant when his second child

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(who is about three years old) was born. Mr. *Phafane* could not remember, he said he would have to check his documents or ask around. Applicant relies on his mother for his date of birth, it does not follow that his mother's memory would be reliable after more than fifty years from his date of birth.

It was in order to give applicant an opportunity to proceed against the appropriate organ of State that I dismissed this application. The belated joinder of the Public Service Commission at this stage with papers of this kind, would not have been the proper thing to do as it would not have helped Applicant in any way.

I therefore dismissed the application with costs as already stated.

W.C.M. MAQUTU
JUDGE

For Applicant : Mr. S. *Phafane*
For Respondents: Mr. L.V. *Letsie*