C OF A (CIV) NO.30/94

IN THE LESOTHO COURT OF APPEAL

In the matter between:

THE ATTORNEY GENERAL **Appellant**

and

MPALIPALI LEROTHOLI Respondent

Coram:

Mahomed P.
Kotze J.A.
Leon J.A

J U D G M E N T

Mahomed P.

The respondent is this appeal was the applicant in the Court a quo in which he successfully sought an order in terms of section 60 of the Police Order No.26 of 1971 extending the statutory period of 6 months during which certain civil actions against the Police must be brought in terms of that Order. The relief prayed for by the respondent was based on the proviso to Section 60 which reads as follows:

> "Provided that the Court may for good cause shown, proof of which shall lie upon the applicant, extend the said period of six months".

Counsel for the appellant contended that the Court a quo had

erred in exercising its discretion in terms of this proviso in favour of the respondent, by granting to the respondent the relief he had prayed for.

There can be no doubt that the Court a quo did indeed have a discretion in terms of Section 60, and an appeal Court, will ordinarily not interfere with the exercise of that discretion unless it is satisfied that that discretion was not judicially exercised. If for example the Court exercising the discretion had failed properly to apply its mind to the relevant facts in the exercise of its discretion, or if it had taken into account circumstances which were irrelevant to that exercise or had otherwise come to a conclusion which no reasonable man properly applying its mind to the question could have come to, the Court of Appeal would be entitled to interfere with the exercise of that discretion. In the absence of any such grounds the Court of Appeal would not be entitled to set aside the order of the Court a quo and substitute its own exercise of the discretion, simply because it would have formed a different judgment if it was called upon to exercise that discretion as a Court of first instance.

Counsel for the appellant contended that the Court a quo misdirected itself in exercising its discretion, because it found prematurely that the police had indeed assaulted the respondent, and had thereafter been guilty of unlawfully detaining and maliciously prosecuting the appellant. In my view this submission is without any merit. The learned Judge in the Court

a quo made no such finding. What he did say was that the respondent had alleged that he had been the victim of unlawful assault and detention and malicious prosecution and that he was entitled to ventilate these allegations in the proceedings sought to be instituted by him.

It was also submitted that the Court a quo had misdirected itself by taking into account the fact that throughout the world, including Lesotho, there was a growing recognition of the need to protect human rights values.

In my view the Court a quo was not guilty of any misdirection in this regard. Respect for human rights is crucial for an enduring and defensible civilization. Human rights values have fundamentally informed the common law of all civilized systems of law, and are crucial to their proper understanding, interpretation and defence. They constantly influence judicial policy and are eloquently articulated with vigour and discipline in an increasing number of international conventions and modern Constitutions, including the latest Constitution of Lesotho which was adopted by a democratically elected Assembly of law-makers. The complaint which the respondent seeks to ventilate in the proceedings sought to be instituted by him, is that his human rights to the integrity of his person, and his freedom was violated by police abuse. The effect of denying to him the relief he sought, would undoubtedly be to preclude him from ventilating that complaint in Court and from recovering some measure of compensation for him, if his allegation were true.

It was therefore clearly relevant and legitimate, for the Court to take into account the culture of human rights, in exercising its discretion in terms of the Order. If it had failed to take account of, these human rights values it might indeed have been vulnerable to the to the criticism that it had failed to take account of a very important factor in the exercise of its discretion in terms of the Order.

Counsel for the appellant further submitted that the Court a quo had misdirected itself by the finding that

> "The appellant 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 the commission of the offence."

There is substance in this criticism. On the record of the evidence, the respondent never said expressly that he was not aware of the provision of the Order, referred to, (although on the probabilities this could perhaps be inferred). The learned Judge in the Court a quo, does therefore appear to have misdirected himself in this respect.

It does not follow however that the appeal should necessarily succeed for this reason. What it means is, that this Court must exercise its own discretion in terms of the proviso to Section 60 of the Order, by taking into account the relevant

factors bearing on the issue and without the misdirection perpetrated by the Court a quo.

In my view that discretion must be exercised in favour of the respondent having regard to the following circumstances:-

1. The effect of denying relief to the respondent would indeed be to preclude a citizen from ventilating in Court a complaint that his human rights have been violated by police abuse and from seeking compensation therefore, if that complaint is justified.

2. The objective of the prescriptive period in the order is to prevent the police from being prejudiced by claims made so long after the alleged cause of action has arisen, that it is impossible or very difficult, to investigate the claim, the identity of the particular policeman allegedly responsible therefore or the circumstances pursuing thereto. In the present matter, however the police sought to prosecute the respondent, after his arrest and detention. The respondent was brought to Court on several occasions and a police docket must obviously have been opened and

witness statements probably obtained. The date of the respondent's arrest, the identity of the policemen effecting the arrest and investigating the offences alleged against the respondent, the circumstances of the investigation, the place and length of the detention, the names of officials having possible access to the respondent during the period and the facts which either justified the prosecution or rendered it malicious, are capable of verification and further investigation from official records. The prejudice to the Crown must be minimal if the respondent is allowed to pursue the proposed action and certainly very substantially less than the prejudice to the respondent if he is not allowed to do so, but has in fact been the victim of police abuse.

3. The respondent does give some explanation why the action was not instituted earlier. He awaited the result of the prosecution against him and thought that the correct time to institute proceedings was after the criminal case was completed. He therefore waited until the prosecution was effectively abandoned before instituting civil

proceedings.

> It is of course correct that he need not have waited for the completion of the criminal prosecution before instituting civil procedures but a layman does not always realise that. In his mind the two issues are often linked. He thinks he should institute his civil proceedings, after he had been vindicated in the criminal trial. It is an erroneous but understandable attitude.

In the result, the learned Judge in the Court a quo was rrect in granting to the respondent, the relief sought by him.

I order that the appeal be dismissed with costs.

I. MAHOMED
PRESIDENT OF THE
COURT OF APPEAL

I agree

G.P.C. KOTZÉ
JUDGE OF APPEAL

I agree

R.N. LEON
JUDGE OF APPEAL

Delivered at Maseru This 13th day of January, 1995.