CIV\APN\59\98

IN THE HIGH COURT OF LESOTHO

In the Application of :

FRANK PAKOSE **Applicant**

vs

THE MINISTER OF FINANCE **1st Respondent**
THE ATTORNEY GENERAL **2nd Respondent**

J U D G M E N T

Delivered by the Hon. Mr Justice M L Lehohla on the 15th day of May, 1998

The applicant has lodged this application on notice of motion against the respondents for an order prayed for in the following terms i.e.

(a) Declaring the seizure of applicant's videos as unlawful,

(b) Directing the first respondent and\or officers subordinate to him to release applicant's videos,

© granting applicant further and\or alternative relief,

(d) Directing the respondents to pay costs hereof.

The applicant relies for the relief sought on his founding affidavit wherein he avers in paragraph 4.1 that he ordered some videos from Africa Entertainment Group by registered post in November 1997.

In due course these videos reached the Department of Customs and Excise on 21st November, 1997 via Maputsoe border post, Leribe.

The applicant further avers that the officers of the 1st respondent duly seized his videos on the alleged ground that they were in contravention of Act No.10 of 1982 section 114(F). The applicant has attached a copy of the detention receipt marked "FP2".

The applicant goes further to aver that he used to play the videos of the like nature alone and privately and without company of any other persons. He states that his purpose for ordering the videos in question was to play them alone and feels he is entitled so to do in terms of freedom of expression granted in section 14(1) of the Constitution of Lesotho.

He avers further that the confiscation of his videos was in clear contravention

of section 17 of the Constitution of Lesotho. He accordingly adds that section 114(f) of Customs and Excise Act 10 of 1982 is invalid to the extent that it is inconsistent with section 17 of the Constitution.

Finally though in argument this averment was not pursued the applicant complained that when seizing his videos the officers of the first respondent did not give him a hearing to which he felt he was entitled.

In response to the above grievances the respondents rely on the affidavit sworn by the deponent Thabang Thamae employed as Principal Secretary in the Ministry of Finance.

This deponent denies that the contents of the applicant's averment in paragraphs 1,2 and 3 are true but nonetheless admits what he refers to as the rest of the same contents.

He admits without qualification the contents of paragraph 4.1. 4.2 and 4.3.

He responds to contents of paragraphs 4.4 and 4.5 as follows :

"Contents herein are denied and applicant is put to the proof thereof.

> In particular I deny that the section 114(f) of Customs and Excise Act 10 of 1982 is inconsistent with the provisions of section 17 of the Constitution. The Act makes provision for seizure of goods which are harmful to public morals. This is exactly what is provided for under sections 14(1)(a) and 17(a) of the Constitution. The provisions of the Act are intended for the enhancement and protection of public morality".

This is a very neat exposition of the law and I accept at least what appears to be its spirit.

Likewise the respondents' deponent denies contents of applicant's averments in paragraph 4.6 and goes further to elaborate the position partly accurately, in my view, as follows :

> ".....The property that was seized from applicant is prohibited by law and as such applicant cannot possess it. In the circumstances we submit that the question of hearing does not arise where one does not have a right to possess".

I have indicated that the deponent for the respondent's is partly correct in his exposition above because the question that remains to be determined is whether given the evidence and the defects that adhere to it on either side of the scale it could be said the requirements of the law have been satisfied with the result that the applicant can in effect be rightly deprived permanently of the videos forming the subject matter of this application.

I have referred to defects on either side of the case because on papers the applicant complains of the fact that his right of expression has been interfered with. But there doesn't seem to me to be anything that he seeks to express by the videos which he has bought. The contention would in my view make sense if the sellers of the videos were the ones who raised this argument. However faced with this difficulty that the Court confessed to the applicant's counsel the latter in submissions and only that late in the proceeding, pointed out that what in effect was being interfered with was the applicant's enjoyment.

The respondents on their part have not indicated in straight -forward and sufficient evidence in what way the videos are harmful to public morality. They seem to have blithely reposed their entire faith in the reference by the applicant in his founding affidavit to a copy of the detention receipt marked "FP2" that because in its description of goods as Phonographic *(sic)* then the applicant must have admitted they are prohibited and that therefore he should be held liable. In this regard perhaps the respondents rely on the principle that what is undeniable is always regarded as admitted.

Section 114(1)(f) of Act 10 of 1982 provides that the importation of the following goods is hereby prohibited, namely

> "(f) goods which are indecent or obscene or on any ground whatsoever objectionable unless imported for research purposes by an educational institution under a permit issued by the Minister".

It seems to me that if the goods were described in evidence as either indecent, or obscene or as objectionable on any other ground the Court would find it fitting to pronounce that the applicant is in breach of the particular law.

Indeed the respondents have indicated the ground on which they allege the applicant has breached the law namely that his act is in breach of the section prohibiting harm to public morals. It is difficult to comprehend though how in the face of the evidence the respondents do not deny that the applicant watches these videos by himself and alone his act may be harmful to public morals. I am however of the view that an individual is a constituent member of the public and that because legislation is not passed for purposes of vanity but to remedy evil then it would be proper to find fault with an individual who lonesomely watches videos which are harmful to public morals.

But the Act in question does not say what is meant by the word public. Thus resort made to the Concise Oxford Dictionary reveals that the word public means "(1) of, concerning the people as a whole (2) done by or representing the people (3)

open to, shared by the people (4) open to general observation etc."

On application of this definition to the facts it would seem that the applicant is not what common sense regards as public. Thus because proper interpretation enjoins that where an expression or a word is patient of two interpretations one being less severe than the other to an individual; the more benign interpretation is to be preferred. It seems then that the applicant stands to benefit by this latter outlook of the matter. Had the respondents in evidence given as their reason for seizing the applicant's videos the fact that these videos were indecent or obscene it seems to me that they wouldn't have met with any problems.

For purposes of perfection reference is made to section 114(3)(c)(I) which provides :-

> "For the purposes of this section and notwithstanding the provisions of any other law, goods referred to herein shall be deemed to be indecent, obscene or objectionable if any part of it, (I) is indecent or obscene or is offensive or harmful to public morals".

It would seem unfair then that if the respondents exercised their election among possible items which would justify their seizure of the applicant's property they should be allowed to achieve the same result even though their election seems to be an unfortunate one in the sense that it does not stand up to the light of reason.

If the respondents may feel aggrieved that their case is being thrown out on a mere technicality and by devious means of over-extending reason to confound reason in the result, the document they are relying on as providing sufficient material for holding the applicant in contravention of the law, and on the basis of whose they sought not to prove the nature of the harm that these videos hold and in what respects importing them is in breach of the law, I am certain both the respondents and indeed the applicant himself would be disabused of any qualms when it dawns on all of them that the description of the goods made not by the applicant but by the respondents' officers, on a format produced, filled and kept by them through their distinguished officer designated as "SCA" is that the goods are Phonographic videos. Much as there is merit in the submission that as with prohibition against possession and use of dagga prohibition of the kind envisaged under the Customs and Excise Act makes it irrelevant whether possession is intended by one or many. But because in evidence the respondents elected to give the reason for their seizure of the goods, the fact that consideration of the meaning and possible application thereof to facts leads to absurdity such absurdity has to be interpreted against the author\authors. This is what the Court cannot ignore. Their election is thus held against them. This is so because they were at large to give reasons which could not conjure absurdity. If they seized the goods, for instance because of indecency or obscenity all that would have remained would be to determine those complaints on

the usual and established standards of being offensive to the sense of propriety of a self-respecting member of the particular community.

While one might, in applying one's mind on what possibly could amount to indecent or obscene or offensive or harmful to public morals, light on Pornographic material, nowhere and nohow could goods described as Phonographic videos approximate material prohibited by the Customs and Excise Act 1982 on the basis of being objectionable. Thus if as the applicant admitted he imported these innocuous materials, he cannot be faulted as his case is more or less on the same footing as that of a man who admits to the charge that he killed another by shooting him dead when the evidence in turn shows that the deceased had died from poisoning long before the purported act of shooting that is not even substantiated was done.

The application succeeds in terms of prayer (b); and because of the discrepancies I pointed out earlier and the fact that the applicant never in fact based his claim on the evidence that the Court itself has discovered and relied on, each party is to bear its own costs.

The applicant would do well not to press his luck further. Next time he might

just not be so lucky as to be eternally surprised how he escaped condemnation in judgment and costs for his curious brand of passtime.

J U D G E
15th May, 1998

For Applicant : Mr Mafantiri
For Respondents : Miss Matshikiza