CIV/APN/368/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:-

TSOTANG MONYAKO **APPLICANT**

and

T.Y. MAGISTRATE Mr Murenzi **1ST RESPONDENT**
ATTORNEY GENERAL **2ND RESPONDENT**

JUDGMENT ON REVIEW

Delivered by the Honourable Mr Justice S.N. Peete
on the 3rd November, 2000

The applicant is an attorney of this court and one of the most senior members of the side-bar and the court has been informed that he has also once occupied the senior position on the bench as a Senior Magistrate.

The record of the criminal proceedings **Rex vs Machine Molepa & another** TY CC 77/98 indicates that the applicant appeared as the attorney of record representing the accused person and the first respondent presided. This criminal trial effectively started on the 21st April 1999. It is common cause that during the course of the trial

the applicant was on some days not available due to some court engagements in the High Court and elsewhere. The record shows that on the 28th June 2000 the matter was formally postponed to the 20th July 2000 the applicant having written a letter to the effect that he was occupied in the High Court. The postponement resulted in the writing of a letter by applicant on the 21st September 2000.

It reads as follows:-

"The Magistrate
T.Y.

Dear Sir,

R.vs M. MOLEPA

The above matter is set down for to-morrow 22nd /9/00, regardless and without informing me. I am still in the High Court from 19-22/9/2000 and cannot possibly come.

You are aware what is left is the defence. (CRI/T/80/94 -Murder Qacha's nek matter). You have passed to client very nasty and irresponsible remarks about me to the extent you will proceed if I don't turn up. I have brought this to the attention of the Chief Magistrate and the Registrar of the High Court. If you feel you have to proceed I have instructed client not say anything and you proceed the way you want, if this is the type of justice you administer despite your oath, if ever you took one.

If you were co-operative I would ask for postponement until the 27/9/00. I can assure if you do proceed I shall take a very strong action against you. Mind you are a foreigner even if you have applied for residence. There (are) several Basotho lawyers whom you have taken their places. WHY? only you and perhaps I know.

I have never had any clash with any Magistrate since I started practice in 1978. You may (be) the first and perhaps the last one.

Signed"

The record then reads:-

"On 27-09-2000 before his Worship Mr C.P. Murenzi.

Court: **Mr Monyako**, before the court proceeds with the part-heard case at hand, would you please address the court in regard to your recent correspondence letter dated 21-09-2000 and show cause why you should not be held in contempt of this Honourable court **ex facie curiae**?

Mr Monyako: Your Worship, the said letter was written to the Magistrate and not to the court. It is not open to the court.

Court: Should I ask my court interpreter to read to the court and you substantiate it accordingly or else the part-heard would not proceed until you have purged this contemptuous correspondence.

Mr Monyako: Wait a minute I am going away. I am standing down as a counsel for the accused.

Mr Monyako shouts in court stands up and runs away.

Court: **Mr Monyako** you are in contempt of court **in facie curiae.**

Court Order: To be committed summarily to custody for a period of one calender week.

Accused remanded to 27-10-2000 for set down of the case. Case to proceed before me with the defence counsel **Mr Monyako** only if he purges his contempt.

Accused adviced to seek another legal representative if **Mr Monyako** insists on standing down. They can decide either to appear in defence in person self represented.

The court will give a hearing date on 27-10-2000."

The following are reasons for committal.

"Reasons for committal

The true basis of punishment for contempt of court lies in the interest of the public as distinct from the protection of any particular injured Judge or Judges.

As a Judicial Officer duly appointed, it is entirely my absolute sacred responsibility to protect and uphold the honour, dignity and authority accorded to the courts of law. This duly is in the interest of the public.

According to the late honourable Chief Justice Mofokeng, it is the duty of the magistrate to preserve his judicial integrity.

In preserving the honour and dignity of the court, the Judicial Officer possesses a formidable weapon in the nature of contempt of court.

According to Synman contempt of court **in facie curiae** is committed when a person insults a court or judicial officer or otherwise misbehaves in a manner calculated to violate the dignity of the court or judicial officer whilst is engaged in its proceedings or open court.

The court may summarily punish the offender after informing him of the misconduct allegedly constituting the offence.

Professor deVilliers in the "The Roman and Roman Dutch Law of Injuries defines contempt of court as -

> "any act or statement that in disrespectful towards a court of law or the members of such court acting in the capacity as such, it includes shouting at magistrate, conducting case under influence of liquor, shouting in court and swearing at the magistrate."

From the background **Mr Monyako** was in contempt **in facie curiae** in that he was asked by the court to elucidate his correspondence which was in the eyes of the court contemptuous. He thus had to comply or decline in a manner that was not disrespectful to the court.

Mr Monyako as the record discloses violently stood up, shouted that he is standing down and packed his bags and walked out of a court in session.

I had nothing to do other than to stop him and commit him summarily for such a contempt by an experienced officer of the court."

On the 28th September 2000 at about 4.45pm appeared in my chambers Advocate Moruthoane without papers urgently informing the court that **Mr Monyako**, the now applicant, has been committed to imprisonment at T.Y. Having heard Mr Moruthoane I ordered as follows:

"1. TSOTANG ALEXIS MONYAKO be released on his own recognizances with immediate effect pending review of the decision to imprison him.

2. The said TSOTANG ALEXIS MONYAKO appears before this court on the 28th September 2000 before 12.00 noon."

Section 109 of the Criminal Procedure and Evidence Act No.9 1981 as amended reads:

"Subject to section 103, the High Court may, at any stage of any proceedings taken in any court in respect of an offence admit the accused to bail".

A formal **ex parte** application was made by Advocate **Fosa** on the 3rd October 2000 before my senior **Brother Molai J.** who ordered that:-

"1. A Rule Nisi do hereby issue and returnable on the 16th day of October, 2000 at 0930 hrs in the forenoon calling upon the Respondents to show cause if any, why:-

(a) the normal periods of service be not dispensed with due to the urgency of this matter.

(b) 1st Respondent shall not dispatch, within fourteen (14) days of his receipt of these papers, the record of proceeding under CR77/98 together with the letter dated written to him by the Applicant, for the decision to imprison Applicant to be corrected, reviewed and set aside as irregular.

(c) Execution of the said decision shall not be stayed pending finalisation of this application.

(c) The Respondent shall not be ordered to pay the costs of this Application.

(d) Applicant shall not be granted such further and/or alternative relieve.

2. That prayers 1 (a) and (b) operate with immediate effect as an interim order."

The interim order and the supporting motion papers were duly served upon the TY Magistrate Court and on the 2nd respondent on the 3rd and 5th October 2000 respectively. By the return date of the 16th October 2000 the respondents had not

indicated their intention to oppose the application. On the 16th October 2000, the rule was again extended and matter postponed to the 23rd October 2000. On the 23rd October 2000 the rule was again extended to the 25th October 2000 and matter postponed thereto for hearing.

When the matter was ultimately heard **Mr Nathane** appeared on behalf of the applicant and there was no appearance for the respondents. **Mr Nathane** was in my view entitled, without even presenting any argument, to have moved that the **rule nisi** be confirmed because it was not being opposed (see **Herbstein & Van Winsen** - The Civil Practice of the Supreme Court of South Africa 4th Ed p. 381). With the leave of Court, **Mr Nathane** proceeded to submit as follows:-

In substance the committal to imprisonment was based upon the conduct of the applicant **in curiae facie** - i.e. his adamnant refusal to read the letter in open court, his shouting in court and running out of the court-room. **Mr Nathane** submitted that the conduct of the applicant on that day should not be looked at in isolation because the element of intention was of paramount importance and that in view of the nature and wording of the letter of the 21-9-2000 the matter should have been treated as **ex facie curiae** so that a proper charge sheet should have been drafted and the letter annexed. Instead an **ex facie curiae** conduct was treated in summarily in a manner which precipitated the outburst of tempers resulting in the committal for contempt. The case **Rex vs Hawkey** - 1960 (1) SA 70 is here relevant. Its headnote reads:-

> "The court in a proper case, when an obvious act of contempt of court is committed in its presence, may summarily fine and punish the offender without conducting, as it were, a minor trial to satisfy itself that

> there was a contempt of court. But there are cases where the action of the person concerned may not be so unequivocal as to justify the assumption that the person undoubtedly intended to be contemptuous: and in such cases the *audi alteram partem* rule should be observed; and, before the court summarily convicts the person of contempt of court, that person should be given some opportunity of making an explanation and of apologising. It does not necessarily follow that the court would accept that explanation or accept the apology. An apology grudgingly given may even aggravate the contempt. But in cases when it cannot be said with certainty that the person concerned had been openly contumacious, he ought to be given some opportunity of making an explanation before being summarily punished."

The case of **S. v. Ntsane** - 1982 (3) SA 467 (shouting in or at court) cites for the definition of contempt of court "**The Roman and Roman Dutch Law of Injuries**" by Mellius de Villiers which states:-

> "Contempt of court then in this sense (**in facie curiae**) may be adequately defined as an injury committed against a person or body occupying a public judicial office by which injury the dignity and respect which is due to such office or its authority in the administration of justice, is intentionally violated" - (my underlining).

Depending on the circumstances, the presiding officer should take immediate action after the commission of any contemptuous act. See **S. v. Poswa** - 1986 (1) SA 215 (laughing at or in court contemptuously). **Mr Nathane** submitted that looked at holistically the conduct complained about suggests an emotional outburst rather than any intentional or deliberate attempt to disregard the order of the Court. Although the terms "wilful" and "deliberate" are the terms usually employed by the courts, this

does not detract from the general rule that intent may also be present in the form of dolus eventualis. (**Snyman** -Criminal Law 3rd Ed - p. 314).

As it has once been said, no contrast should be made between the decorum of proceedings in the magistrates' courts and in the High Court because .....

> ".....Every judicial officer in the exercise of his functions is entitled to the same courtesy and respect from those present in his court whether such officer be Judge, Magistrate or other judicial functionary and magistrates and others presiding in inferior courts have a duty to maintain the decorum of the proceedings in their courts and where necessary for such purpose, exercise the power which the law affords them" per Ramsbottom J. in **R. v. Rosentein** 1943 TPD 65 at 70.

Mr Nathane stressed the fact that on that particular day tempers in fact rose quite high and out of proportion and in this volatile atmosphere, the applicant could not have entertained the intention to injure the dignity of the court. He submits that since the conduct was directly linked to the letter written **ex facie curiae**, the applicant ought to have been given opportunity to be heard. **Mr Nathane** submits that - besides disobeying the order of court to read the letter, the applicant did not utter any insolent words; he did however in the heat of the moment, perhaps shouted, packed his bags and bolted from the court-room!

As **Snyman** (supra, p 315) aptly puts it-

> "If contempt of court **in facie curiae** is committed, a court may summarily convict and punish the wrongdoer. This power to punish summarily for contempt is essential for a court to uphold its dignity and authority (**Silber** 1972 (2) SA 475); but our courts have sometimes emphasised that this power is an extremely drastic weapon, which should not be resorted to lightly but with utmost care and circumspection ..... as the hearing is usually charged with an emotional atmosphere. Trivial contempts are best ignored and affording the accused an opportunity to apologise against withdrawal of the charge of contempt may often uphold the dignity of the court just as well as a conviction for contempt" **(Tobias** 1966 (1) SA 656.)

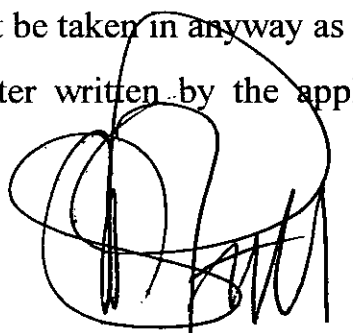
One thing though has to be said whether **Mr Monyako** could competently without leave of the court, withdraw or resign from the case as he purported to do. According to Herbstein and Van Winsen (supra p.228) an officer of the court may renounce his mandate only if he has good reason for doing so-**Voet** 3.3.22. The resignation purportedly made by the applicant was in fact a demonstration of protest and part of the continuing conduct in court. It cannot be judged separatim.

All in all and having considered the circumstances of this particular case, I confirm the **rule nisi** firstly because the respondents have decided not to file their opposition and secondly because I am not convinced that the applicant in the charged atmosphere then existing in court, had wilfully and deliberately flouted the authority of the court.

Lastly I would wish to express the grave concern over the circumstances of this case. The continuous and endless postponements of cases cause delays and the role players

namely judicial officers, prosecutors, defence counsel, accused persons and witnesses are often at their tethers' end and everyone's patience, courtesy and decorum are often tested. Committal proceedings should be a last resort after all civilized exhortations have proved fruitless. Thirdly, I am of the view that in exercising its drastic power to commit for contempt, the court should always bear in mind the provisions of the Constitution - Section 12 (2) (c) and (d) which provide that a person facing a criminal charge must be given adequate time and facilities for the preparation of his defence, and the he be permitted to defend himself before the court in person or by a legal representative of his own choice.

In confirming the rule, this court must not be taken in anyway as deciding upon the civility of the language used in the letter written by the applicant on the 21st September 2000.



S.N. PEETE

JUDGE

For Applicant : Mr Nathane

For Respondents : No appearance