CIV/APN/248/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MASUPHA EPHRAIM SOLE APPLICANT

vs

GUIDO PENZHORN	1ST RESPONDENT
HJALMER H.T. WOKER	2ND RESPONDENT
JOSEPH TEBOHO MOILOA MOILOA	3RD RESPONDENT
ATTORNEY GENERAL	4TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION	5TH RESPONDENT

JUDGMENT (REASONS FOR)

Delivered by the Honourable Mr Justice S.N. Peete
on the 1st August 2000

On the 11th July 2000 **Mr Phoofolo** appeared before me in chambers and moved an urgent application **ex parte** in which he sought and obtained an interim order couched in the following terms:-

"1. That a Rule Nisi be, and it is hereby issued calling upon the respondents to show cause, if any, why-

(a) The periods of notice provided by the Rules of Court and treating this matter as one requiring urgent attention are hereby dispensed with;

(b) First, second and third respondent should not be interdicted from taking any further part in the preparation for an/or presentation at the trial of the charges preferred against the applicant and accused in the Criminal trial No.111/99, on behalf of the Crown, which Criminal trial is presently pending before this Honourable Court.

(c) In the event that respondents oppose this application, respondents should not be directed to file their opposing papers on or before the 20th July, 2000, and applicant to file replying affidavit, if any, on or before 26th July, 2000; and that the matter be placed on the roll for argument on the 31st July, 2000.

(d) Respondents should not be directed to pay for the costs hereof in the event that this applicant is opposed.

(e) Granting applicant further and or alternative relief.

1. Prayer 1 (a) to operate with immediate effect as an interim relief."

I also ordered that Prayers (a) and (c) operate with immediate effect.

The respondents having been duly served on the 11th July 2000 with the interim order and founding affidavits deposed to by the applicant filed their intention to oppose on the 18th July 2000 and elected to raise certain points of law without filing any answering affidavits. Rule 8 (10) (c) reads:-

> "Any person opposing the grant of any order sought in the applicant's notice of motion shall-
>
> (a) .....
> (b) .....
> (c) if he intends to raise any question of law without any answering affidavit, deliver notice of his intention to do so, within the time stated setting forth such question."

For brevity, the respondents raised the issue of **lis pendens** contending that the relief sought in Prayer 1 (b) of the notice of motion had been previously raised in the criminal proceedings in **King vs Masupha Ephraim Sole and Others** - CRI/T/111/99 and is a issue pending to be determined by my Brother Cullinan A.J. The respondents attach an annexure "A" titled -

> **"NOTICE OF INTENTION TO OBJECT, TO EXCEPT AND TO QUASH THE INDICTMENT, SECTIONS 152 (1) 153 (1) AND 162 OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT 1981."**

More importantly para 5 of this document reads-

"5. The accused further contends that the prosecutors are not objective, impartial and detached as prosecutors are expected to be and that the handling of this trial by prosecutors who are perceived to be partial, and biased (as they represented the interests of the complaint herein in other matters) will deprive him of his fundamental rights to a fair trial as envisaged in Section 12 of the Constitution of Lesotho 1993. If the prosecutors do not voluntarily withdraw from the trial of the accused the accused intends to apply to this Honourable Court for an order interdicting and restraining them from further taking part as prosecutors in the criminal matter of the accused."

It can be safely assumed that after the notice (Annexure "A") was served on the Director of Public Prosecutions on the 9th June 2000, the original was placed in the file of the criminal proceedings in CRI/T/111/2000. The question therefore is whether the relief or issue raised in prayer 1(b) is pending before Cullinan A.J. though not yet decided. In fact in this notice the applicant intimates his intention to proceed with the said application to cause the first and second respondents to be restrained and interdicted by "**this Honourable Court**" - meaning the Criminal Court in **CRI/T/111/2000** - on the grounds the said respondents will be biased and partial as prosecuting counsel thus violating his fundamental right to fair trial as guaranteed under Article 12 of the Constitution of Lesotho. Indeed the lengthy affidavit of the applicant catalogues several grounds for attacking the impartiality of the two respondents - (See para 14) - in fact he alleges categorically that they are even potential or possible witnesses in the forthcoming criminal trial (para 21) and have personally even participated in police investigations.

In my view the issue **lis pendens** should be interpreted sufficiently wide enough to make provision for cases where a **lis** has only been formally proposed to be instituted - **Van As vs Appollus & Another** - 1993 (1) SA 606; **William vs Shub** 1976 (4) SA 567; **Noah vs Union National South British Insurance Co. Ltd** - 1979 (1) SA 330 at 332-333 A;

In my view the applicant had already mooted the application and given a formal notice to the Director of Public Prosecutions requesting him to withdraw the two respondents as his representatives in the criminal trial failing which he has intimated and proposed his intention to apply to the "trial court" for an injunction disqualifying the two respondents as prosecutors on the grounds that they were biased and not impartial.

When the issue of **lis pendens** is raised and has been sufficiently established, the court has discretion to exercise; and in this case, the question is whether the application can be more justly and equitably and indeed conveniently dealt with by the presiding Judge in the criminal trial. (**Yekelo vs Bodlani** 1990 (3) SA 971 at 973 - Considerations of convenience and fairness are important - **Van As vs Appolus** (supra) at 610D. In this case it is not in doubt that my Brother Cullinan A.J. has seen the Notice "Annexure A" and regards the subject matter of impartiality of the two respondents as a matter to be considered before plea. This criminal trial has been set down for hearing from Tuesday 1st to 4th August 2000. Even if the applicant would not raise it before the appellant pleads, the trial Judge could bring the notice Annexure "A" **mero motu** to the attention of the applicant.

This notice - most importantly - stands "unwithdrawn" from the court file in CRI/T/111/99.

For this court and indeed any court to be seized with this matter in a proper manner, the applicant must lodge an application in terms of Section 22 (1) of the Constitution of Lesotho. (This procedure has however not been followed by the applicant). It reads:-

"22. (1) If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is liked to be contravened in relation to him (or, in the case of the person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect ot the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction -

(3) to hear and determine any application made by any person in pursuance of subsection (1); and

(4) to determine any question arising in the case of any person which is referred to it in pursuance of the subsection (3),

and may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 21 (inclusive) of this Constitution:

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

If it was the applicant's case that his right to a fair trial under section 12 of our Constitution had been violated or was likely to be violated a formal application on notice ought to have been made in terms of section 22 (1). I am acutely aware that the Chief Justice has yet to make rules with respect to practice and procedure for the enforcement of the protective provisions under the Constitution.

In the case of **Smyth vs Ushewokunze and Another** - 1998 (3) SA 1125 Gubbay C.J. - in dealing with an application almost similar the present observed that the objectivity, detachment and impartiality of prosecution were essential components to a fair trial as envisaged under section 18 of the Constitution. Without deciding the issue in instant case, I can only point out that Gubbay C.J. described the right to a fair trial as " a constitutional value of supreme importance".

My Brother Cullinan A.J. is already seized with the criminal trial this week and in my view convenience and indeed justice requires that he, and he only, should determine the issue - already on notice - whether the participation of the two respondents as prosecutors in the criminal trial due to start before him will prejudice the right of the applicant to a fair trial under section 12 of our Constitution. The application before me in so far as it seeks to enforce section 12 of the constitution is improperly before this court because a formal application under section 22 (1) of the said constitution has not been made to invoke the constitutional jurisdiction of the court; the application has been however made **ex parte** under the Rule 8(22) (see Certificate of urgency signed by Mr Phoofolo in which it should have been stated that relief under Prayer 1 (b) was being sought under section 22 (1) of the Constitution.) In my view

the High Court can determine this matter only if it has original jurisdiction as a constitutional court. Section 22 (2) of the Constitution reads :-

> "The High Court shall have original jurisdiction - (a) to hear and determine any application made by any person in pursuance of subsection (1)"

I therefore hold that since the provisions of section 22 have not been invoked this court cannot sit as a constitutional court mero motu and even on this ground alone I am of the view that the application ought not be allowed. The constitutional jurisdiction of this court is specially created by Section 22 (2) of the Constitution and must be specially invoked. It should not be assumed. The unlimited jurisdiction of the High Court under the High Court Act of 1978 relates to "civil or criminal proceedings and not matters constitutional. Subsection 22 (5) of the Constitution reads:-

> "Parliament may confer upon the High Court such powers in addition to those conferred by this section as may appear to the necessary or desirable for the purposes of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section".

In his heads of argument (paragraph 4) the applicant states:-

> "The subject matter of the application is an interdict which raises the question of the applicant's right to a fair trial in terms of the Constitution."

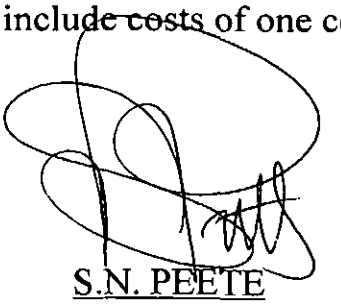
I do not agree that sitting as a trial Judge in the criminal case, my Brother Cullinan A.J. is precluded from sitting as constitutional court if the provisions of section 22 (1) (2) of the Constitution are properly invoked before the appellant pleads to the indictment. This section reposes in High Court wide and unfettered discretion to make any order it considers appropriate for the purpose of enforcing the provisions of Bill of Rights (See **Smyth vs Ushewokunze** (supra) at p.1141).

I am aware of the provision of High Court Rule 22 (15) which provides:-

> "The court hearing an application whether brought ex parte or otherwise may make no order thereon, save as to costs, if any, but grant leave to the applicant to renew the application on the same papers supplemented by such affidavits as the case may require."

In this case, the applicant's attorney was fully aware that Annexure "A" had been filed in the court file of the criminal proceedings. He ought to have been aware that before the High Court can make a pronouncement under section 12 of the Constitution, its constitutional jurisdiction must be specifically invoked by the applicant under section 22. This has not been done in this application. (**Masefabatho Lebona vs DPP** - 1997-98 LLR 143)

I therefore uphold the points of law raised **in limine** by the respondents and dismiss the application with costs which should include costs of one counsel.



S.N. PEETE

JUDGE

For Applicant : Mr Phoofolo

For Respondents : Mr Dickson SC and

Ms Hermaj SC

Mr Sello