CIV/T/89/96

IN THE HIGH COURT OF LESOTHO

In the matter between:

VINCENT MOEKETSE MALEBO	**PLAINTIFF**
and	
THE MINISTER OF INFORMATION AND BROADCASTING	**1ST DEFENDANT**
THE ATTORNEY-GENERAL	**2ND DEFENDANT**

RULING

Delivered by the Honourable Mr. Justice G.N. Mofolo
on the 31st day of March, 2002.

The plaintiff has issued summons against the 1st and 2nd defendant claiming:

1. Payment of M100,000-00 damages.
2. Costs of suit and
3. Further and/or alternative relief.

The reason for the damages is that plaintiff claims 1st defendant has defamed him. Defendants after making an appearance to defend had excepted to the

declaration in terms of Rule 29(1) of the Rules of Court on the ground that

> 'it was mandatory for plaintiff to have alleged that he gave the defendants the required statutory notice of the above action pursuant to the Government Proceedings and Contracts Act No.4 of 1965.'

Mr. Ntlhoki for the plaintiff had opposed the exception. When, on 9 March, 2000 the trial was to proceed Mr. Makhethe for defendants had proceeded with the exception alleging, amongst other things, that the Act he had referred to was mandatory particularly because according to section 4 of the Act it was said:

> 'no action shall be instituted by way of summons by virtue of the provisions of section two of this Act until the expiration of one month next after notice in writing has been delivered to or left at the office of the Principal Legal Adviser, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the delivery of such notice shall be a necessary allegation in the plaintiff's summons or declaration.'

Mr. Makhethe has said the 'shall' in which it is employed is imperative and that no notice in writing of plaintiff's intended action was delivered or left at the office of the Principal Legal Adviser as in law required. Moreover, that plaintiff could only

have commenced action after the expiry of one month after delivering the notice as aforesaid. Mr. Makhethe though has said he is not insisting on dismissal but rectification.

Mr. Ntlhoki has said in terms of the Rules of Court the exception was hopelessly out of time and cannot be entertained. Even should the plaintiff not succeed on this, the exception was not well taken because according to Rule 29(1), the claim was to be such that cannot sustain action and absence of an averment did not imply that the action cannot be sustained. He says any omission can be rectified by evidence. He says the section does not stipulate penalty in the event of non-compliance. He says the word shall in the context in which it is used does not imply obligation but it is permissive and can only be implied as imperative if there is an accompanying penalty otherwise it is to be construed as permissive. He says whether notice was given can be cured by evidence or an amendment.

According to the papers before me the summons was lodged with the Registrar of this Court on 23 February, 1996 and served on defendants on 8 March, 1996. Appearance to defend was entered on 12 March, 1996 and an exception signed by defendant's attorney on 25 March, 1996. It is not clear when the

exception was filed with the Registrar though Mr. Ntlhoki appears to have been served with the same on 22 April, 1996. Plaintiff's copy does not reflect that plaintiff was served after the exception was lodged with the Registrar as is the normal practice.

I have said that Mr. Ntlhoki has said that the exception was hopelessly out of time though, as I have said, it is not clear when the exception was filed with the Registrar of the Court. Be this as it may, the exception was served on Mr. Ntlhoki on 22 April, 1996 and after this service the incredible happened. Although Mr. Ntlhoki was served with Notice of Exception on 22 April, 1996, he appears to have lodged his intention to oppose with the Civil Registry of the High Court on 12 November, 1996, more than six (6) months after the notice had been served on him. There is no rule which allows such belated opposition to a pleading properly taken and on this ground alone the court is entitled to grant the exception. However, as I have shown, Mr. Makhethe has been generous saying he would rather the action was not dismissed but rectified.

Act No.4 of the Government Proceedings and Contracts Act, 1965 is more extinctive than acquisitive, prescriptive as it is in its nature. In many cases the

legislation expressly stipulates that certain formalities must be complied with and certain procedures followed when power is exercised - see *Braude v. Pretoria City Council, 1981 (1) S.A. 680 (T) 683 G-H.* Where timeous notice of impending action was not given, courts have held administrative action to be ultra vires. see *Fredericks v. Stellenbosch Divisional Council, 1977 (3) S.A. 113 (C), Roberts v. Chairman, Local Road Transportation Board (1) 1980 (2) S.A. 472 (C).* Non-compliance need not be attributed to public authority alone since private individuals may be obliged to observe formalities and procedures as well. Question is whether a defect of procedure or form will be fatal.

Mandatory/Directory Dichotomy:

According to the decision in *Marais v. McIntosh, 1978 (2) S.A. 414 (N), 421,* administrative action based on formal or procedural defects is not always invalid for technically the law is not and end in itself in view of the fact that legal validity is concerned not merely with technical but also with substantial correctness. According to the decision in *Essack v. Pietermaritzburg City Council, 1971 (3) S.A. 946 (A) 962 F - G, Stadsraad van Venderbylpark v. Administrator, Transvaal, 1982(3) S.A. 166 (T),* substance should not be sacrificed to form for in special circumstances greater good might be achieved by overlooking technical defects - see

Voet 1.3.16 (iv) and Flemix v. Taljaard, No, 1982 (2) S.A. 450 (W).

Also, according to *Grotius Inleiding 1.2.2*, it has long been recognised that in certain circumstances a failure to comply with particular legal requirements will not constitute a fatal defect in the act concerned. By preferring to refer the matter to rectification, there can be no doubt that Mr. Makhethe was aware of this requirement. It would seem, though, that in South African law a distinction has been drawn between so-called 'mandatory', 'imperative' or 'peremptory' rules on the one hand and 'directory' rules on the other. A distinction is described by Lord Penzance thus:

> 'Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the courts at Westminster, I am not sure that it is the most fortunate language that would have been adopted to express the idea; but still that is the recognized language and I propose to adhere to it. The real question in all these cases is this: A thing has been ordered by the legislature to be done - what is the consequence if it is not done? In the case of statutes that are said to be imperative, the courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are void. On the other hand, when the

> courts hold a provision to be ---- directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one.' (*see Howard v. Bodington (1877) 2 PD 203).*

But apparently the distinction is not that clear in practice though it may be in the realm of ideas as was recognised by Lord Penzance quoting an earlier dictum of Lord Campbell which expresses the true nature of the inquiry whenever it arises, namely that:

> 'No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be construed directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.' (see *Liverpool Borough Bank v. Turner (1861) 36 LJ (CL) 379, 380 - 1.)*

The exercise apparently entails that in each case one 'must look to the subject-matter, consider the importance of the provision that has been disregarded, and the relation of the provision to the general object intended to be secured by the Act. Indeed the history of the legislation might be of assistance. Accordingly, if injustice would result from strict compliance with the requirement, this might indicate that it

is only directory; conversely, if injustice or prejudice might result, from non-observance, it is likely that the requirement is mandatory - see *Howard v. Bodington (1877) LPD 203, 211 c f Leibbrandt v. South African Railways, 1941, A.D. 9, 13; Charlestown Town Board v. Vilakazi, 1951 (3) S.A. 361 (A) 370; Maharaj v. Rampersad, 1964 (4) S.A. 638 (A) 643; Sutter v. Scheepers, 1932 A.D. 165, 174 and cases therein quoted at p.447 and footnotes 386 -389 of Baxter Administrative Law.'*

Also, the legislative terminology adopted whether imperative or not, or whether couched in negative or positive terms might also provide an indication as to how strictly the requirement should be observed - see also *Sutter's & Messenger of Courts* cases above and *Mathope v. Soweto Council, 1983 (4) S.A. 287 (W) 290 B-D.* It would also appear the existence of sanctions for failure to comply provides a relevant though somewhat unreliable guide and perhaps as Mr. Ntlhoki has submitted absence of sanction is a clear pointer that the statute is permissive. See in this respect *McLanglin NO v. Turner, 1921 A.D. 537, 544, 550.*

According to *Evans 'Mandatory and Directory Rules' (1981) ILS 227* it would seem greater clarity may be obtained if three different situations are taken into account:

(i) when the requirement is an enabling one;

(ii) when it is an essential pre-requisite of validity; and

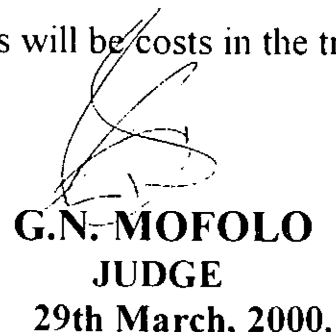
(iii) where it is not an essential prerequisite of validity.

Of course herewith are dealing with (ii) above. According to *Baxter p.449*, peremptory words such as 'shall' or 'must' indicate that the authority has no choice but to obey the provision while 'may' or 'can' is treated as permissive. Nevertheless, whether a decision has been taken to be violation of a particular provision, the question to be asked is whether, according to the decision in *Essack v. Pietermaritzburg City Council, 1971 (3) S.A. 946 (A) and cases quoted at p.449 of footnote 402* of Baxter above, 'the legislature intended non-compliance to be visited with nullity' for it could well be that the intention of the legislature was for non-observance to attract some sanction other than invalidity. It has been held much as permissive language is an unreliable guide in determining whether a discretionary power exists, so too is 'imperative' language such as 'shall' or 'must' for these constitute *prima facie* guides though they have been held within specific contexts to be directory in nature. The degree of observance is also of importance for when a requirement is mandatory it has to be rigidly or exactly observed. The courts though adopt a flexible approach as was the case in *Maharaj v. Rampersad* above, c/f *E.M. Motors Ltd. v. Boutle, 1961 (2) S.A. 320 (N) 327-8, Shalala v. Klerksdorp Town Council, 1969 (1) S.A. 582 414 (N), 418*. The question is invariably whether the injunction postulated by the legislature has been observed. For example, failure

to publish a translated version of certain regulations has been held not to invalidate regulations. Also failure to publish a notice advertising certain conditions imposed upon a town planning scheme was held insufficiently defective to undermine the validity of the scheme. And yet these rulings do not preclude orders directing compliance with the directory requirements. Be this as it may, it would seem organisations are to proceed in a fair manner.

Defendants are undoubtedly organisations of some sort expected to proceed in a fair manner notwithstanding legislation in their favour. Mr. Makhethe on their behalf has been fair for instead of asking for the invalidity of the summons he has offered that there be rectification of the summons.

Accordingly, this court orders that summons be rectified and/or/amended within fourteen (14) days of this ruling. Costs will be costs in the trial.



G.N. MOFOLO
JUDGE
29th March, 2000.

For the Applicant/defendants: Mr. Makhethe
For the Respondent/plaintiff: Mr. Ntlhoki