CIV/APN/142/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

THESELE MASERIBANE	**APPLICANT**
and	
THE RIGHT HONOURABLE THE PRIME MINISTER	**1ST RESPONDENT**
THE ATTORNEY GENERAL	**2ND RESPONDENT**

For the Applicant : Mr. K. Mosito

For the Respondents : Mr. K. Tampi

JUDGMENT EX TEMPORE

Delivered by the Honourable Mr. Justice T. Monapathi
on the 27th day of April 2000

This application was filed as of urgency. It was filed on the 20th of April, 2000. Indeed on the same date Respondents were served with the papers. It is clear that it must have been that Thursday preceding the Easter weekend.

The application is about a declaration, interdict and other relief as shown in the notice of motion. And it concerns a Commission of inquiry appointed by the First Respondent by Legal Notice number 33 of 2000. That legal notice shows appointment of three (3) Commissioners, namely Mr. Justice R.N. Leon (Chairman), Mr. Justice J. Browde and Mr. Justice B.L. Shearer. It shows other appointed people as shown in section 10 who are styled "Secretariat." The application seeks to declare the appointment of that Commission of Inquiry as null and void. It sought to declare the appointment of that secretariat are null and void as well. It also sought to interdict the Commission of Inquiry from carrying out its functions as directed in the terms of reference as shown in that legal notice.

The terms of reference of that Commission are contained in section 3 of the legal notice. The terms run up to ten or thereabout and they are very extensive in their nature. They cover a large area over a period described as the 1st July 1998 up to November 1998.

The notice contains appointments of certain Commissioners all of whom can be described as judges and coincidentally they are retired judges of the Republic of South Africa. All have served in the Court of Appeal of this country and it was not disputed that at least one of them was still serving at present.

A point was not taken about the extent on the inconsistency of the terms of reference or otherwise. There was a dispute about the appointment of the learned judges and also about the secretariat. And also about the way the Honourable Prime Minister has gone about in making the appointments. One of the points being that he has exceeded his powers.

Applicant is a citizen of this country. There was no dispute that he would

and did have the capacity to institute these proceedings. The reason being that he says there is a pending murder charge against him which concerns the death of one Kelly Mahase who reputedly died during the time of what one can call disturbances occurring during the period of the time covered by the terms of reference which matter (about the period of the death) was common cause.

After some time it became clear that the complaint of the Applicant was a simple one. Briefly state it was that this Commission will be investigating circumstances in the terms of reference over that period. That the Commission will probably touch on the facts connected with the death of the deceased with which Applicant is charged in the indictment the Applicant stood facing. He says the potential for unfair trial therefore exists, that the trial against him will be unfair. That time when the charge against him is tried there may have been comments, discussions or unearthing of facts that concern the very charge against him directly. He will suffer some jeopardy of some kind if those facts are released. That therefore this Court ought to protect him by stopping (interdict) the operation of this Commission. If it does not do so it must declare the work of the Commission as null and void.

This fact of the application having been filed on the 20th April 2000 has had the effect that at the time when the hearing of this application was to be proceeded with the Commission was already proceeding. The Applicant therefore most wisely decided that he would not insist on the operation of the Commission being interdicted but if it continued to run it did so at the risk of its work being declared to be invalid. So that what remained before this Court for argument was primarily that remedy normally called a declaration or declarator. That is, the Court will pronounce that the work of the Commission was null and void.

A declaration has a certain importance to lawyers. If is that it is a discretionary remedy. It is not a legal remedy strictly speaking. It is because the Court has to look at all the circumstances and decide whether relief claim is a fitting Order that it may make. It has to use a judicial discretion. It looks at imperative and overwhelming reasons even if the Applicant may have been right in promoting the issues of rights, the substance of his claim. The Court does not only consider whether the rights are is valid but looks at the effect of what may be ordered. Is the remedy proper in the circumstances? That is why it is called a discretionary remedy.

I start off by commenting about the learned judges appointed by the Honourable Prime Minister. The judges are experienced lawyers. All of them were judges of standing. One of them has participated in not less than five Commissions of Inquiry instituted by the government of the Republic of South Africa or other institutions in the Republic of South Africa. I found it difficult to understand the kind of prejudice feared by the Applicant by appointment of this learned judges. They are a fact finding body. Theirs is not to conduct judicial proceedings. How their finding will affect judges or judicial officers of this country is difficult to fathom.

To say their findings will influence the work of a presiding officer in the intended murder trial against the Applicant is nonsensical if not far fetched. That is why I did not understand why the learned Attorney General wanted to evade the issue that those learned judges could still be judges working in the Appeal Court of this Country. Even if it was true with that all the judges were occupied as judges of that Court there would, in my view, be absolutely nothing wrong with regard to the attack levelled against their positions. It is because Commissioners are appointed from judges of the Courts of almost every country and because of their expertise.

A government wishing to appoint a Commissioner from body of judges need not wait for that judge to retire, nor to be disabled nor need the judge be an old man as long as he is a judge and is able to do fact finding. So that I find nothing wrong with the appointment of learned justices. And the fear that their appointment will influence the working of this Court and that it will influence that charge the Applicant is facing is nonsensical. So is the perception. One finds it difficult to understand why judges of this Court will all be after this case that the gentleman faces. It does not make sense. Learned judges are not busybodies. It is not convincing that judges of this Court including learned justices will all of them be after this pending case that the gentleman faces. And that this that finding which the Commission will be about will influence the working of this Court beats everything. So that that one is something that one should dismiss instantly.

I am not suggesting that the facts connected with the circumstances of the charge against the Applicant will not be touched. The probability is there. But what is important is that anything about those facts or circumstances will be a then slice of the activity of the Commission judging from its terms of reference. Because the Commission is not about the Applicant nor the case that the Applicant faces. It will occupy a very small piece of activity. That is why Counsel for the Applicant fount it difficult to show any precedent before this Court about an objection of this kind. And indeed there was no precedent for this kind of objection. It could be true that, as Mr. Mosito pointed out, once people who were appointing Commission's were faced with a situation like this one they opted out not to issue a Commission. But he did not show us a precedent. Indeed it was hard to find.

In the Section 3 of the Public Inquiries Act, the reading of subsection goes as follows:

"3(1) If the Prime Minister considers that it is <u>in the public interest</u> to do so, he may by notice published in the gazette appoint a commission of inquiry consisting of one or more Commissioners to inquire into any matter that is connected with the <u>good government of Lesotho or</u> is a matter of <u>public concern."</u> (required emphasis)

Mr. Mosito submitted that in terms of this subsection there were many objectionable ways in which the Honourable Prime Minister went about the opportunity of the Commission. That while the Prime Minister was entitled in the public interest to appoint a Commissioner of a Commission of Inquiry. It was fair if he considered that he ought to do so and this he could do following on his own good judgment. And that he could do it subjectively that is concerning things that he himself considers proper or deserving in the circumstances. But Mr. Mosito complains that it does not show in the legal notice that the Prime Minister in fact considered it to be a matter in the public interest.

Counsel was suggesting that if it was so it should have shown in the wording contained in the legal notice. That nothing by way of words show that he did in fact consider things in the public interest. Mr. Mosito uses the lawyers' words that it is a subjective way in which the Prime Minister goes about considering that a matter is of public interest and that is, to repeat the judgment is his alone. But then as he did argue a matter has either to be connected with good government or be a matter of public concern. But then the test is objective that is whether the Prime Minister did in fact consider a matter of public concern or whether a matter was connected with good government. He said certain things must show if a matter was concerned with good government of Lesotho or was a matter of public concern.

I have found it difficult to interpret public interest and public concern as different concepts. And in fact one of the South African cases that Mr. Mosito quoted GOVERNMENT WORKERS UNION vs SCHOEMAN 1949(2) 463 which actually dealt with the treatment of the meaning of the two words or phrases/expressions. It actually declared that the meaning and effect were mutual and translatable. That they meant the same thing. If a matter is a matter of public interest is also a matter of public concern as it was reasoned. And this was corroborated in one of the decision spoken about yesterday I suspected it was this one of CONELLY v DIRECTOR OF PUBLIC PROSECUTIONS or CHANDLER v DPP AC 763 (which I had not read). It says this is no how a matter of public interest cannot be matter of good government if that matter is investigated by government. A government working for good government will investigate matters of public interest and public concern. So that to speak of good government in this context and that of public concern is redundancy. They seem to have one meaning and effect. If the Prime Minister did not spell out good government separately or public concern separately he was not doing what is unusual in this circumstances where there is mutuality of the two concepts.

I now speak about this matter of staff that is to be found in section 10 of the Legal Notice. It appears most clearly in terms of the Public Inquiries Act that the Prime Minister ought to do nothing more than to appoint a Commission. He does not appoint other people. A suggestion was being made, a suggestion, that he appointed the Secretariat in section 10. I agreed that the way section 10 is drawn, as I found, there was no other interpretation that he did that the Prime Minister did so appoint. The question is whether it was within his power. It was not. It is because there are other people who are supposed to do that. The Attorney General does the other things (appointments). The appointed Commissioners do the other appointments. But one cannot speak of this exercise of the Prime Minister which

appears flawed or irregular as vitiating the operation of the Commission.

Obviously the Prime Minister did more than what he should have done because this interpretation of section 30(b) of the Interpretation Act 1977 contemplates situations such as this. Then the Honourable Prime Minster should have explained why and how the Secretariat has to exist as it does. May be he should have referred to another Minister having made the appointments or the Attorney General having done so by appointing a person like Mr. Makhethe. So there is no doubt that only if the appointments were not done by him this does not show on the face of the legal notice. This is mere surplusage. The Prime Minister has done more than what he should have done. I need not even declare that the appointments were incorrect. I will later show the reasons why I should not.

The comments by Counsel about the so called origins of the Commission of Inquiry are correct. Originally the appointment of Commissions was a Crown prerogative. It was what is sometimes called a ceremonial privilege, Executive prerogative, whatever one may or would call it according to the jurisdiction and circumstances. Meaning that the Crown or the Executive President would be using this so called prerogative. Prerogative is a residue of all powers and acts of government. This means that when all have been empowered to do certain things either by Acts of Parliament or other sources the remainder of the power which are unallocated belongs to the Crown for purposes of functionality completeness and effective government. And this was the powers through which Commissions were appointed. In this country all was done was to give Commissions certain powers by proclamation. So that they come to deal with certain powers dealing with witnesses and punishing people for disobedience of certain orders was one of the powers.

As it has been explained in argument of Counsel all the exercises and powers of prerogative were consolidated in the Public Inquiries Act No.24 of 1994. Meaning that all these experiences that belonged to the period of the prerogative were now concretized or codified in an act of parliament which has now become a complete law. There were certain experiences and precedents built into that Act of 1994. It is also called an administrative act, meaning that everything that has to do with the meaning the powers and regulation of every Commission of Inquiry is to be found in this Act. It actually means more than that. It means that if there are protections or remedies they should be found in that Act. If anybody complains against any functions of a Commission then we must investigate as to what is contained in the Act itself. How far it protects one? How far it prohibits certain things to be done and how far it allows certain things to be done. Hence the question would be: Does this Applicant have any remedy in the Act itself as on the alternative of scuttling the whole Commission. My belief is that this was not hard to find.

Looking at section 12 of the Act of 1994 one is allowed Legal Counsel. It is provided that a Counsel will be allowed to be called when a person's interest is at risk before a Commission. In the Act in any matter of concern to a person the Commission is enjoined to call that person. And then one can make his submissions or representations. This is more so if a person such as the Applicant initially has an advance warning that his matter will be touched by the investigations. The Applicant therefore has an initial notice that his matter may feature. Then one should speak of section 8 of the Act as follows.

A report of a Commission may be excised. A portion can be taken out of the report. There are various reasons why a portion of a report can be taken out. Vide section 8(3). One of them is national security. One of these is privacy of an

individual and most important "the right of a person to a fair trial." I am not even suggesting that I would know how the Prime Minister would come about the exercise of taking out a portion as provided in the Act. But my suspicion is that an Applicant would have to move before the Court having heard what the Commission was about concerning his interest. Someone would, amongst others, have to come to Court and say that a certain portion of the report ought to be taken out having heard what the commission was about concerning his interest. I suspect that someone would have to do so on his own initiative. Indeed we even have instances in South Africa where people have moved for taking out certain contents or portions of a Commission's report. These we read about so many times in the papers. An example was a report by the T R C where the ANC party had asked for removal of a certain portion which worried the party. If I recall well Honourable Mangosutu Buthelezi or some other luminary had had such a motion or a complaint (not necessarily similar to the present) made. It means that this can be done. And this seems to be the protection provided for under section 8 of the Act.

I want to re-visit the matter of public interest and public concern that Counsel has spoken about yesterday. Why this matter assumed interest was that things such as the sport of rugby had to be put under Commissions for Inquiry. The administration of the sport such as rugby were being inquired into. And in that South African case that Mr. Mosito has spoken about it was a Commission into the administration of rugby. And then a good and legitimate question was: Is this matter a matter of public interest? A management or mismanagement of a sport by sportsmen and administrators. Should the President actually institute a Commission for that marginal and sectional sport that some people took rugby to be. That is why it was important to investigate whether it was a matter of public concern or a matter of public interest. Because the sport was perceived to be a

marginal or sectional one by some people. The interpretation of the two phrases and the decision on their interpretation were made in that context of that debate.

Here we are to haggle about a matter of public importance as to whether it was a matter of public concern or interest where virtually to whole town centre was burnt down after a visible public commotion. Where there was disturbance spreading over three months. And a question is now being asked whether this is matter of public concern and public interest. And indeed the Prime Minister may have not spelled it in so many words such as:

> "I have considered that because of this and that a Commission should be appointed."

But looking at the terms of reference themselves, even man in the street can see that this is a matter of public concern. And as a Court would take judicial notice of the fact that there was disturbance of that kind which would have to be inquired into. And I do take judicial notice. And I therefore do not understand what more explanation would be needed from the Prime Minister. The introduction to the legal notice tells us many things. That he acted in terms of section 3 which speak about public interest and public concern. I would further speak about the meaning of those two words to say that. To have a concern in a matter is to have an interest in the matter and to have an interest is to have a concern as every student's dictionary will show.

I come to what I suspect will be my last comment. And a very important one coming to the issue that I earlier on spoke about. It is about the discretionary remedy. And what declaration means where a Court is being asked to declare some action invalid. What is called for from the Court and the aspect of delay. This aspect of delay has been discussed in so many cases the Court of Appeal. The last

one which I recalled was that one of LESOTHO BANK v STANLEY MOLOI. That in litigation whether someone has come to Court on time or whether not is very important.

When the Court is being asked to give a discretionary remedy lawyers always pretend not to understand this. Because they forget that litigation is a serious thing. It is a serious thing in which one must show *bona fides* (good faith). If one does not demonstrate serious interest or if one does is very important. Delay is very important. The Court having to speak about delay because litigation is a serious activity. It is costly and it is expensive to run. The Court is this claim for a discretionary remedy does not look at the claimant alone. It does not look at one's own interest only. It also looks at the interests of other people. That is why in an extreme a Court can deny one his rights if the interests of other people are affected. And if when one is to be given the relief it adversely affects the other people. Most of the time innocent people could be inconvenienced. This is more so when a matter is said to be urgent (as the present one) when it should not have been so.. That is why lawyers can cleverly create urgency. They do so because it gives them certain advantages mostly some clients of theirs would be interested in merely embarrassing other people (by getting undue orders) to their own ends. That is why you will hear a litigant say "Even if I do not ultimately get what I claim "Ak'u mo tšoare matsoho" (Just interdict him in the meantime or for a while"). "Even if I do not get what I want tie his hands". That is the trick about seeking interdicts when they are not being genuinely sought. That is what lawyers do.

And the Applicant herein did say the matter is urgent. It was not. He had created the urgency himself. How has he done it? The Commission was appointed on the 9th of March 2000. He waited and waited and came to Court on the 20th of April 2000. At the time government must have gone into costs and expenses of

bringing up/setting up the Commission. And it was during Easter vacation. It is against this background, the inconvenience of other people, the costs and expenses which things are important and matter to a Court. If the Applicant came to Court at the time that he did how does he demonstrate that he has good interest and *bona fides* in this litigation? He does not.

We hear references to the Deputy Prime Minister having said something in parliament about the existence of the Commission or intention to set up on a certain day in April. Those things do not interest us as a Court. What is interesting or of concern is the time that the Legal Notice appoints as the one of the establishment of the Commission which was the 9th of March 2000 appointing the date of the 25th April 2000 as date of commencement of the work of the Commission.

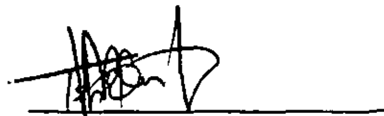
These other matters found in the answering affidavit including of course that the Prime Minister has said that it is intended that the whole report will be publicized to the whole world and international institutions, this primarily (as it was alleged) to prejudice or aggravating the potential for unfair trial do not concern us. They are threats of a merely potential nature and as such do not concern us here. We are concerned that everybody including the Prime Minister should comply with the law and the procedure set out in the Act. And section 8 tells us what the Prime Minister should do. If he goes about publicizing the Commission at the United Nations and such like that would not be our business. Our business is that he must comply with the law.

Where certain provisions of the law are not complied with that we must deal with. This includes of course the disputed Secretariat. About that if the Applicant come to Court on the 20th April 2000 one would surely find fault as I have with the

contents of section 10 as I have. But how can it be rectified in the circumstances of the Commission having even commenced before the hearing of this application that is on Tuesday the 25th April 2000. Would it be judicial discretion and would it make sense if I were to order for expunction of section 10? And say all that the six people have been doing had amounted to nothing? If I am expected to apply judicial discretion is this what I may do. Where one was seeking for assistance of this Court at that hour of the 20th April 2000.

My finding is that this Applicant has got remedies in the Public Inquiries Act itself. He has got a protection of his rights in that Act. He must exercise them accordingly. The Act prescribes remedies to people such as Applicant to which he must resort. He cannot expect the scuttling of the Commission.

So this application fails with costs. Meaning that the Commission might as well proceed in its work.



T. MONAPATHI
JUDGE
27th April 2000