CIV/APN/322/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:-

'MALEHLOA 'MAKOPANO NTHO **APPLICANT**

and

MOKEKE NTHO **RESPONDENT**

J U D G M E N T

Delivered by the Hon. Mr. Justice G.N. Mofolo
on the 6th day of September, 2001.

This application came to this court on an urgent basis on 28 August, 2000 and the same day an interim court order was issued made returnable on 11 September, 2000 and prayers 1 (a), (b) and (c) of the Notice of Application were made to operate with immediate effect.

Prayer 1 (a) reads:-

> A Rule Nisi returnable on the 11th day of September, 2000 at 9.00 a.m. be and is hereby issued calling upon the respondent to show cause, if any, why

(a) the periods of notice and mode of service of processes prescribed by the Court Rules shall not be dispensed with on the ground of the urgency of this application.

Prayer (b) reads:

> the respondent shall not be directed to refrain forthwith from assaulting or in any way molesting applicant.

Prayer (c) reads:

> the respondent shall not be directed to desist from chasing the applicant out of the parties' marital home.

Although the application was seemingly urgent, there have been several postponements and extensions of the rule for reasons that are not immediately apparent to me though the suspicion is that since the applicant was armed with an interim order hereafter there was no need to move on an urgent basis.

Several factors affecting the application have been raised by counsel on either side and I intend dealing with these though not necessarily in the order in which they were raised. The application was argued on merits. Mr. Mafisa has said though relationships between the applicant and respondent are now good, he is pressing ahead with the application so that the applicant is not assaulted

again for the reason why there is seeming peace is because respondent has an order against him. He says respondent's conduct towards the applicant is improper and respondent needs to be restrained permanently.

Mr. Ntlhoki for the respondent has said the truth of the matter is that applicant was not assaulted but that in the heated atmosphere applicant had banged herself against furniture. He says things got out of hand and it was never the respondent's intention to assault the applicant. He has said by reason of the fact that relationships are now good the order would be academic as the application had been overtaken by events. He says there is no need to disturb present harmony between the parties.

Mr. Ntlhoki has said that another reason for dismissing the application was that the application had been brought *ex-parte* on an urgent basis a long way back in August, 2000 and it had been claimed a separate action was contemplated. The so-called separate action had not materialised. *E.R. Sekhonyana v. L.E. Church LLR 1993-94 p.455* had been quoted in support. Mr. Ntlhoki has submitted another reason was that this was an application simplicita recognisable in the subordinate court and could not come to this court except by leave of court. In support he has quoted sec. 18 (i) of the Subordinate Court Order No.9 of 1988 as well as sec.6 of the High Court Act, 1978. He has also said that the medical certificate is hearsay and inadmissible in that the author has

not filed a supporting affidavit nor is the certificate certified. In conclusion Mr. Ntlhoki has submitted the doctrine of *de minimis non curat doctrine* applies in the case.

While in several cases courts of law have made themselves clear on the question of urgent applications, I have not found anything particularly useful as to urgency in *Molapo Qhobela & Or. V. Basutoland Congress Party & Or. © of A (CIV) No.0) of 2000.*

An application proceeding as urgent and with urgent trappings is to proceed as urgent, otherwise it loses its potency with the very prospect of the application being dismissed on this ground alone for being seen as an abuse of process. Even as Mr. Mafisa has submitted that the respondent behaves as he does because he has an interim interdict against him, it is unfair to temporarily interdict him, it is unfair to temporarily interdict a person and deprive him of his immunities when, at the end of the day, he may be found blameless. Proceedings against a party with an interim order have to be expeditious so as not to have the sword of Demosthenes hanging over his head under the pretext of urgency. A person cannot be punished before being found guilty; an interim order without finality has such an effect for it is subject to discharge at the end of the day.

In *Lesotho National Development Corporation and Lesotho National Development Corporation Employees and Allied Workers Union C of A (CIV) No.2 of 2001),* the Appeal Court reiterated a number of rules of court as to urgency and particularly Rule 22 (b) which reads:-

> 'In any petition or affidavit in support of an urgent application, the applicant shall set forth in detail the circumstances which he avers render the application urgent and also the reasons why he claims that he could not be afforded substantial relief in an hearing in due course if the periods presented by this Rule were followed.'

The application has set forth no such circumstances or in any way adverted to the Rule at all. In the course of its judgment the appeal court has found a delay of 6 months 'not in the interest of the parties' and it would seem too long notwithstanding that 'on the respondents own case the matter required urgent resolution.' At page 19 the Appeal Court has noted:

> 'Therefore it is once again brought to the notice of practitioners that they face punitive costs orders should they issue certificates or urgency and launch proceedings, whether *ex-parte* or not, when the circumstances do not justify the use of extraordinary measures provided for in Rule 22 of the High Court Rules. The High Court is requested to ensure that the abuse of this Rule by practitioners ceases forthwith.'

I do not think the request by the Appeal Court to this court 'that the abuse of this Rule by Practitioners' cease forthwith ends here. It is, in my view, an appeal to this court that abuse of the Rule should be punishable by extraordinary costs coupled with the dismissal of the application on the sole ground of urgency where the Rules have not been complied with.

As I have said above, there is nothing in the founding papers motivating this court on the urgency of the application. The application was launched on 28 August, 2000, the interim rule obtained on the same day and from here on the applicant decided to sit on his laurels. In view of the fact that the application was claimed to be urgent and took almost a year to reach finality, I cannot think of anything more deliterious and reprobate.

But there is another thing. I do not agree with Mr. Mafisa that the good relationships existing between the applicant and respondent are as a result of the interim court order for, if so, the applicant should have proceeded urgently as claimed. The truth of the matter is that present respondent's behaviour is a matter of conjecture. It could well be he behaves as he does because of the interdict or because he is a reformed man.

This application has taken an inordinately too long a time before finality having regard to the fact that it was only head on 02 August, 2001, almost a year

after it was launched; although it is not the function of courts of law to be peace-makers their function being to settle disputes, it seems to this court it would be in the best interest of the parties that the reigning peace and harmony be not disturbed. I have no intention of disturbing this peace for, were violations feared, the applicant should have without much ado finalised the application and proceeded on a threatened action. The threatened action has not materialised because circumstances have changed for the better. Quite apart from the fact that this application was not proceeded with in terms of the Rules of court it would seem it was overtaken by events thus rendering it unnecessary.

The applicant having lost the initiative, this court is of the view that this is an application which on all counts has to be dismissed and accordingly the application is dismissed and the rule discharged. There will be no order as to costs.

This court has found it unnecessary to consider implications of the medical certificate or *de minimis non curat doctrine* as these would not take the application any stage further.

G.N. MOFOLO
JUDGE
5th September, 2001.

For the Applicant: Mr. Ntlhoki
For the Respondent: Mr. Mafisa