CIV/APN/313/00

# IN THE HIGH COURT OF LESOTHO

In the matter between:

SEROENG MPHENETHA APPLICANT

and

TANKISO NTSEBENG 1ST RESPONDENT

TANKISO NTSEBENG 2nd RESPONDENT

## JUDGEMENT

Delivered by the Honourable Acting Mrs Justice
A.M. Hlajoane on the 9th August, 2001

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This was an application for an order declaring the Respondents' appeal noted on the 24th May, 1999 to have lapsed. The matter had started at the Magistrate's Court in CC 1134/94, and judgement had been granted against the Respondents on the 29th October, 1997.

On the 9th August, 2001, Mr Mohau appeared for the Applicant and there was

no appearance for the Respondents. Mr Mohau in moving his application had indicated that the Respondents had clearly displayed the attitude of reluctance to prosecute their appeal. I therefore granted the order and showed that reasons would follow. This case was a typical portrait of Litigants who would just note an appeal merely to frustrate the execution of judgement against them or apply for rescission of judgement for same purposes.

Turning now to the facts of this Application. The Applicant was still the Applicant in the Court a *quo*, similarly were the present Respondents the Respondents.

The case arose out of the negligent driving of the first Respondent's vehicle by the second Respondent, which resulted in a collision with Applicant's vehicle. According to the record of the case, the Applicant who was represented by Mr Mohau, had given his evidence together with his witnesses. They had been duly cross-examined by the Respondents' Counsel. The Respondents had failed to testify in their defence, neither did they show up, despite the fact that their Counsel had informed the Court that he had duly notified them of the date of hearing. Judgement was thus given against them.

It was only a year after judgement had been granted, that on the 7th November, 1998 Respondents applied for rescission of judgement. The Application was on the 12th May 1999 refused by the Magistrate. The Respondents then noted an appeal to this Honourable Court on the 24th May, 1999.

Counsel for the Applicant, Mr K. Mohau approached the Court for a Declaratory Order, relying on Section 52 (1) (a) and (d) of the High Court Rules 1980. This was after he had served the Respondents' Counsel with notice in terms of Rule 39(2) of the High Court Rules, on the 6th December, 2000; inviting him to approach the Office of the Registrar to come and set the matter down for hearing. The notice of set down was also served on the Respondents' Counsel on the 10th May, 2001.

The Rule read as follows:-

Rule 52(1) (a) "When an appeal has been noted from a judgement or order of a Subordinate Court, the Appellant may within four weeks after noting of the appeal apply in writing to the Registrar for a date of hearing."

52(1)(d) "If neither party applies for a date of hearing as aforesaid the appeal shall be declared to have

lapsed unless the Court on good reasons shown shall otherwise order."

Rule 52 goes on to show under subsection (4)(a) that:

> "It shall be the duty of the Appellant or of the party who has applied for a date of hearing to prepare and lodge with the Registrar four typed or photocopied copies of the record of the case ....."

When I proceeded to deal with this Application, the Respondents had not prepared the record for appeal neither was a photocopy made. It was the Applicant's Counsel who had made himself photocopied scripts from the Magistrate Court, whilst the Respondents had shown no interest in the matter that had been pending before Court. The Respondents had failed in all material respects to show that they had been genuine when they noted this appeal. Contrary to the mandatory Rules of this Court, this had been evidenced by the following:-

(a) They failed to prepare the record of proceedings either in the form of a typed record or photocopy.

(b) They failed to set the appeal down for hearing.

(c) They failed to give security for costs,

and this as already stated had been a clear indication that their noting of appeal was merely to delay and frustrate the execution of judgement against them. See Dr S.M.

Kaleem vs M. Hlajoane 1997-98 LLR and LB 506. They never intended to prosecute this appeal because even from the Magistrate's Court it was only after a year had gone and had been served with a writ of execution that they had unsuccessfully decided to apply for rescission of judgement.

In the result, the Application for an order declaring the appeal to have lapsed was granted with costs as prayed for in the notice of motion.

**A.M. HLAJOANE**
**ACTING JUDGE**

13th August, 2001

For the Applicants: Mr Mohau
For the Respondents: Mr Sekake

**CRI/A/10/2000**

# IN THE HIGH COURT OF LESOTHO

**In the matter of :**

**ISMAEL MASHONGOANE**

**vs**

**REX**

## JUDGEMENT

**Delivered by the Hon. Mr. Justice M.L. Lehohla on the 10th day of August, 2001**

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This appeal has appeared several times on the roll without being heard.

On 8-9-2000 when it first appeared the judge who was to hear it was unavailable hence the matter was postponed till 15-11-2000.

On that day the Crown was represented by Miss Mofilikoane while there was no appearance on the side of the appellant.

The appellant's name was called three times on the Public Address System and the orderly who did so, came to report "no response" in Court.

When the record of appeal reached the Judge's desk on 04-07-200 from subordinate Court Thaba Tseka, I gave the following directive to the Registrar of this Court i.e.

> "Registrar : please place on roll and warn the appellant to come prepared to argue in person or through his Counsel why sentence should not be appreciably enhanced in the event that conviction is confirmed."

The Court had noticed that for a particularly aggravated form of rape the appellant had received a somewhat light sentence which was rendered even more ineffectual by suspending half of it to three years' imprisonment which falls far below the starting point of five years repeatedly made mention of in Judgements and review orders of this Court in such cases as : CRI/REV/51/2000 Rex vs. TSELISO PHATS'OANE (unreported); CRI/REVs/75 and 81/81 Rex vs. (1) NEO JANKI (2) KATJANA KHAUTA (unreported) by Cullinan C.J. as he then was CRI/REV/572/88

Rex vs. GRIFFITH LEHANA (unreported) CRI/A/1/2000 MOSHE MONTSUOE vs Rex all of which rely on Rvs. BILLAM & ORS [1986] 1 ALL ER 985 ( C A) in respect of the guidelines suggested for sentencing in rape cases. For a benign form of rape the starting point according to BILLAM above should be 5 years where the accused pleads guilty. Where there are aggravating factors the starting point is given as 8 years where use of force beyond that necessary to accomplish rape is applied. Where several other factors such as use of firearms or any form of weapons are used or are threatened to be used to induce submission the sentence should be appreciably higher than the 8 year starting point. The same should be the case where rape is repeated or the victim is a minor in the care or custody of the culprit.

On 15-11-2000 the matter was postponed to 05-02-2001 because again the appellant did not attend court.

On 05-02-2001 the Court once more assembled. The appellant did not respond to the call by the orderly to report in Court.

The following note summarises the recorded minute of the day on Court's file:

"For Crown : Miss Mofilikoane

For appellant : no appearance.

Appellant's name called 3 times on the P.A. system

Orderly reports : no response.

Miss Russell the Assistant Registrar informs Court that she wrote to the appellant's Counsel informing her (i.e. Miss Ramafole) that the matter would be heard today as well as delivering notice of hearing to Police Thaba Tseka.

Miss Mofilikoane assures Court that she met the appellant's Counsel and notified her of the present date of hearing and of the Court's concerns about non-appearance of either the appellant or his Counsel on previous occasions."

The appellant had been charged with the crime of rape of one Moleboheng Mokebe allegedly committed on 5th July 1998 at Ha Ramokoatsi in the Thaba Tseka District. The appellant had pleaded not guilty to the charge and the matter went to trial. Witnesses were called, led and cross- examined. But at the end of the day the appellant was convicted of rape and sentenced to six years' imprisonment of which

half was suspended.

He appealed against the Subordinate Court's "Judgement" on the grounds that

(1) the learned Magistrate misdirected himself in holding that the appellant raped complainant for the following reasons :

(a) the evidence adduced at trial did not support the conviction of rape more especially because the other defence witnesses as well as the Court witness supported the accused in his alibi.

(b) further grounds of appeal will be filed as soon as the record of proceedings as well as the judgement are available."

The further grounds of Appeal are as follows :-

1. The learned Magistrate misdirected himself in finding that the Appellant raped the complainant for the following reasons:

(a) The mere fact that the accused failed to mention that his mother was in the shop with him is not in itself a basis for conviction on a charge of rape (sic) the Appellant's story about his mother was corroborated by the Court witness who was not in any way biased.

(b) The complainant's story and that of her witnesses ought to have been treated with caution since they were her relatives and there is no excuse whatsoever why the complainant did not raise an alarm even when it is alleged that the Appellant ran away when PW 2 arrived, in fact it must be pointed out that the same witness failed to answer or say why he did not raise an alarm or chase the assailant. Furthermore it is clear from the evidence of PW 2 that he never saw the person who is alleged to have raped the Complainant.

(c) The learned Magistrate erred in holding that simply because the Court witness 'Marorisang did not talk to other people except the complainant therefore her evidence was to be dismissed as a coincidence.

(d) The complainant mentioned in her evidence that she went to the shop once to buy a candle and left before the Court witness, herself left, (sic) It is submitted that the question which was posed by the Court i.e. what time, and by whom was the complainant raped has not been answered by the Crown who had to answer and proof (sic) same beyond reasonable doubt.

(e) The mere fact that the doctor concluded that penetration did occur does not necessarily mean that the complainant was raped. The doctor's evidence that (sic) not in any way corroborate (sic) the offence of rape (sic) this is supported by the use of the words "it is impossible to rule out rape."

The so-called further grounds of Appeal above seem to be argumentative and on that account tend to obscure the issues being sought to be drawn to the Court's attention. Ground (e), where it seeks to deal with the doctor's evidence, merely serves to obscure the point being tried to be made.

It is of vital importance for all practitioners charged with the important task of

formulating grounds of appeal to heed the importance of maintaining brevity, clarity and conciseness in going about that exercise. As it is now it is impossible to see the wood for the trees in these grounds of appeal.

The only ground of appeal that is clear to me is the first one in the first set of grounds which is based on the appellant's alibi.

In response to this ground it is important to note that the Magistrate's conclusion that the appellant's alibi was false is to be gathered from the evidence the magistrate relied upon saying, according to DW 3 Makhosi Mashongoane, who supported the Crown case that "the accused did have time [meaning I think occasion] to go out of the shop whilst the shop was still open" see page 18 of the judgement.

It is clear that in going out of the shop the appellant's identifiable features or face where not covered hence the witnesses's ability to say they saw him.

To buttress this point reliance should be reposed on the authority submitted by Miss Mofilikoane for the Crown that in **R vs. Hlongoane** 1959 (3) SA 337 at 340 - 41 it was said

"The legal position in regard to alibi is that there is no onus on the accused to establish it and if it might reasonably be true he must be acquitted. But it is important to point out that in applying this test, the alibi does not have to be treated in isolation. .....the correct approach is to consider the alibi in the light of the totality of the evidence in the case and the Court's impression of the witnesses."

It would indeed be naive for the learned magistrate to overlook readily available evidence which in part is firmly based on common sense that the appellant was seen by people who knew him within the vicinity of where the offence took place and allow himself the leisure of some conjecture that even as the appellant was seen in point A he in fact was in point B lying tens of miles away from point A.

I accept the submission by the learned counsel for the Crown that the learned magistrate has not misdirected himself in convicting the appellant of rape. The learned magistrate didn't base himself on the failure of the appellant to mention his mother's presence. Instead he convicted him in the light of the evidence adduced by the complainant and other crown witnesses. He only highlighted the disparity

between the appellant's version and that of his own witnesses to indicate how hopeless the appellant's case was. Needless to add the appellant's position is placed in particularly dim light by three factors (1) absence of gainsaying evidence by him (2) a finding from the facts that he is a liar and, (3) the medical evidence that corroborates the act of sexual intercourse though for some obscure reason made light of in ground (e) by the appellant as follows "it is impossible to rule out rape."

The magistrate cannot be faulted for believing the complainant's story that the appellant raped her if he found her to be a credible and reliable witness. Nor can he be faulted for believing PW 2's story that the latter saw the appellant running away. The fact that PW 2 didn't raise an alarm cannot detract from the fact that the man he saw running away was the accused. PW 2's explanation that he didn't raise an alarm is plausible in the light of the fact that he didn't know why the appellant was running away. PW 2 in this regard has the credit of not falling into the temptation of falsely saying he raised an alarm when he saw the appellant run away because he knew the latter had just been raping the complainant. For being this honest PW 2 should rather be praised for truthness than condemned as adducing false evidence.

It is worth bearing in mind the importance of a Swazi Court of Appeal decision

with regard to corroboration, in **Velakathi vs Regina** Case No 56 of 1984 (unreported) at page 5 as follows:-

> "There is no rule of law requiring corroboration of the complainant's evidence in a case such as the present one. But there is a well established cautionary rule of practice in regard to complainants in sexual cases in terms of which a trial court must warn itself of the dangers in their evidence; and accordingly should look for corroboration of all essential elements of the offence.
>
> Thus in a case of rape the trial court should look for corroboration of the evidence of intercourse itself; the lack of consent and the identity of the alleged offender. If any of these elements are uncorroborated the court must warn itself of the danger of convicting and in the circumstances it will only convict if acceptable and reliable evidence exists to show that the complainant is credible and trustworthy witness."

In the light of the approach adopted by the learned magistrate in the court below I find that he cannot be faulted for believing the complainant and PW 2 whose evidence places the appellant within the vicinity of the scene of events and inside the time frame of the occurrence thereof.

With regard to sentence the rule is trite that sentence is pre-eminently a matter for the discretion of the trial court. Thus an appeal court cannot lightly interfere unless the discretion was not exercised judicially. See **Lebitsa & anor** vs. **R 1980** (2) LL R 404.

In the light of the desirability to send out a message to rapists as long ago as 1988 as illustrated by **JANKI** and **KHAUTA** above that the game is not worth the candle it would seem in halving the sentence of 6 years' imprisonment imposed by the court below the learned magistrate has failed to heed the Superior Courts' clarion call to seriously come to the aid of rape victims.

In CRI/REV/132/97 **Rex vs. Teboho Melamu** this court expressed its gratification that even in South Africa a clarion call has been sounded to illustrate that those who indulge in rape are not to expect any treatment with kid-gloves from

Courts. This court said :

> ".....it is gratifying to note that last week the Chief Justice of South Africa, the Honourable Ismael Mahomed, till recently the President of our Court of Appeal, imposed a sentence that gave a clear warning to rapists that they would be warehoused for a long time if they persist in indulging their unwholesome lust against the will of women and girls in that country." (the sentence imposed was 15 years' imprisonment as against 4 or 7 years which till recently were the norm).

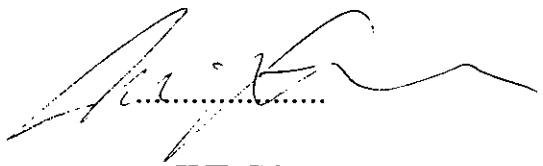
The message I am trying to transmit to Subordinate Courts should come into clearer perspective in the light of the following considerations.

In **Phatsoane** (unreported) at page 9 above is cited the case REV/127/88 **Rex vs Khotso Nalana** decided by Cullinan C.J. as he then was as far back as 30th March, 1988. In contrast to sentences which till the recent past had been imposed by Lesotho Courts for rape cases the learned Chief Justice on review in that case set aside an 18 months' imprisonment imposed by a Magistrate Class 1 at Butha Buthe

for **attempted rape** and imposed 5 years' imprisonment in place thereof. Thus if as far back as in 1988 for attempted rape the culprit received no less than 5 years' imprisonment it would not sound right that for **rape actually committed and accomplished** the culprit should get away with an effective term of only 3 years' imprisonment which is the balance of the 6 years whose half was suspended.

Taking every factor into consideration I felt that the Justice of this case required that conviction be confirmed but the suspension of the sentence be set aside and in its place a sentence of six years' imprisonment be imposed.

It is so ordered.



JUDGE

10th August, 2001

FOR APPELLANT : NO APPEARANCE

FOR CROWN : MISS MOFILIKOANE

CIV/APN/445A/2000

# IN THE HIGH COURT OF LESOTHO

**In the Application of:**

PAPALI MALEFANE — Applicant

and

MINISTRY OF LAW AND CONSTITUTIONAL AFFAIRS — 1st Respondent

MINISTRY OF PUBLIC SERVICE — 2nd Respondent

ATTORNEY GENERAL — 3rd Respondent

## JUDGMENT

**Delivered by Honourable Mr. Justice B.K. Molai on**

**14th day of August, 2001**

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The applicant herein filed, with the Registrar of the High Court, a Notice of

Motion in which she moved the court, ***ex-parte***, for an order framed in the following terms:

> "1. Rule nisi be issued calling upon respondent to show cause why the following prayers cannot be made absolute.
>
> (a) Interdicting the respondents from transferring the applicant to the Ministry of Justice pending finalisation of this application.
>
> (b) Granting Applicant access to her office in the 1st Respondent Ministry forthwith pending finalisation of this application.
>
> (c) Reviewing and setting aside the decision to transfer applicant from her substantive post.
>
> (d) Cost of suit.
>
> (e) Further and / or alternative relief.
>
> 2. That prayers 1 (a) and (b) should operate with immediate effect."

It is, perhaps, convenient to mention by way of background that the applicant is a civil servant, in the Government of Lesotho, attached to the Drafting section of the 1st Respondent Ministry as the Principal Assistant Parliamentary Counsel. Her immediate superior is the Parliamentary Counsel, one Ntebaleng Morojele-Maseela, who is the head of the Drafting Section.

On 31st March 2000 the applicant received, from the Parliamentary Counsel, a memo of the same date, in which the latter complained about the former's repeated absenteeism from work, without leave. The memo (annexure P.M.M.4), which was, ***inter alia,*** copied to the 3rd respondent and the Deputy Attorney General, concluded by inviting the applicant to give reasons, if any, why disciplinary action could not be taken against her. On 15th June 2000, the Parliamentary Counsel addressed, to the 3rd respondent, another memo (annexure P.M.M.5) from which it appeared that the applicant had, on 5th April 2000, written, to the Parliamentary Counsel, a letter which was, however, not annexed to the papers placed in the file before me. I have not, therefore, been favoured with the contents of the applicant's letter of 20th April 2000.

Be that as it may, the gist of annexure P.M.M.5 was that the applicant persisted in her negative attitude e.g. she came in and went out of the office as she pleased and never reported anything to the Parliamentary Counsel in her capacity as the head of the Drafting Section. As a result, it was becoming increasingly difficult for the Parliamentary Counsel to run the Drafting Section of the 1st Respondent Ministry efficiently. Consequently, the Parliamentary Counsel requested that, in the interest of the smooth running of the Drafting Section, the applicant be transferred to some other Section or Department.

It would appear that the 3rd respondent referred annexure P.M.M.5 to the Deputy Attorney-General for necessary action. Wherefore, the Deputy Attorney-General addressed a letter, dated 16th June 2000, to the applicant, requesting the latter to respond to annexure P.M.M.5. By her letter of 6th July 2000 (annexure P.M.M.7), the applicant did comply with the request and denied the accusation that she had a negative attitude towards the Parliamentary Counsel. As proof thereof, she referred the Deputy Attorney-General to her letter of 5th April 2000. As it has already been pointed out, earlier in this judgment, the applicant's letter of 5th April 2000 is not annexed to the papers placed before me, in this case. I have, therefore, no way of knowing its contents. In the contention of the applicant, there was no justification for transferring her from the Drafting section of the 1st respondent Ministry to some other sections or Departments.

On 21st July 2000, the 2nd respondent addressed, to the applicant, a letter (annexure P.M.M.1) in which the latter was advised that it had been decided to transfer her from the Drafting section of the 1st respondent Ministry to the Ministry of Justice and Human Rights, with effect from Monday, 24th July 2000. Annexure P.M.M.1 reads, in part:

"Dear Madam,

I wish to inform you that it has been decided that you be transferred from the Ministry of Law and Constitutional Affairs (Drafting Section) to that of Justice and Human Rights. You will be held against the position of Senior Legal Aid Counsel, Grade G for the time being.

You are requested to report to the Principal Secretary, Ministry of Justice and Human Rights by Monday 24th July, 2000.

Kindly note that your terms and conditions of service in other respects will however, remain the same.

Yours faithfully

T. Mathealira
for Principal Secretary
Ministry of the Public Service"
**(my underling)**

The applicant referred annexure P.M.M.1 to a firm of Legal Practitioners who, on 26th July 2000, wrote, to the 2nd respondent, a letter, annexure P.M.M.2, in which they challenged the transfer. The grounds upon which the transfer was challenged were firstly, that as the Principal Assistant Parliamentary Counsel the applicant was on Grade 14 (H). The position of Senior Legal Aid Counsel to which she was being transferred, in the Ministry of Justice and Human Rights, was, however, on Grade 13 (G). In the contention of the Legal Practitioners the applicant's transfer amounted, therefore, to her demotion which was irregular

inasmuch as she had not been afforded prior opportunity to be heard. Secondly, the author of annexure P.M.M.1, namely Mathealira, had no power to transfer or demote the applicant. That was the prerogative of only the Public Service Commission.

I have underscored the words "I wish to inform you that it has been decided," to indicate my view that T. Mathealira merely passed the information that the decision to transfer the applicant had been taken. The words do not necessarily imply that T. Mathealira is the person who has actually taken the decision to transfer her.

In reply to annexure P.M.M.2, the 2nd respondent addressed, to the applicant's legal representatives, a letter, dated 1st August 2000, in which it was denied that the applicant's transfer amounted to a demotion. In the contention of the 2nd respondent, it was a redeployment, within the Public Service, made by the Minister responsible for the Public Service, in accordance with the provisions of the Public Service Act, 1995.

Consequently, the applicant approached this court with the application for relief, as prayed in the notice of motion. The application was, on 20th November

2000, moved before Ramodibedi J who, however, took the view that there was no urgency shown in the founding affidavit. He, therefore, ordered that the application should proceed in the ordinary way, as being one on notice.

Thereafter, the respondents filed notice of intention to oppose. The answering and the replying affidavits were duly filed by the respondents and the applicant, respectively. In as far as it is relevant, the facts disclosed by the affidavits are not really in dispute that the applicant was transferred/moved by the Minister responsible for the Public Service from the Drafting section of the 1st respondent Ministry to the Legal Aid Department of the Ministry of Justice and Human Rights. However, the applicant averred that the power to appoint/transfer civil servants in the Public Service was vested in the Public Service Commission and not the Minister responsible for the Public Service. In the contention of the applicant, her transfer was actuated by nothing but malice and as a sort of punishment for her alleged absence from work.

Ntebaleng Morojele-Maseela, the head of the Drafting Section of the 1st respondent Ministry deposed to an answering affidavit in which she averred that the reasons for her request that the applicant be transferred from the Drafting Section were clearly set out in the Memorandum she had addressed to the

Attorney-General on 15th June 2000 (annexure P.M.M.5), namely that the relationship between herself and the applicant had become intolerable due to the latter's negative attitude towards her. The deponent further averred that until the end of August 2000 the Drafting section of the 1st respondent Ministry had been operating from the Post office Building, in Maseru. However, early in September 2000 she was instructed to move the office of the Drafting section to the Government complex at Qhobosheane. The move was effected during the period from 6th to 8th September 2000. The applicant, who had neither vacated her office nor handed over her files, despite the fact that she had been transferred to the Ministry of Justice and Human Rights, was not present during the three days when the Drafting section moved from the Post Office Building to the Government Complex, at Qhobosheane. The files and the furniture she had been using were moved, in her absence, and locked in one of the new offices of the Drafting section, at the Government complex. The office was kept under lock and key on the instructions of the Director of Administration, one Mr. Maluke, who wanted the applicant to come and explain to him why she had not taken the transfer to the Ministry of Justice and Human Rights.

In her averment, about four days after the Drafting section had been moved from the Post Office Building to the Government Complex, the deponent received,

from one of the clerical assistants, a leave form completed and signed by the applicant (annexure N.M.I). The leave applied for was for the period from 6th to 8th September 2000. According to her, the deponent could not approve annexure N.M.I because the applicant had long been transferred to the Ministry of Justice and Human Rights, she was, therefore, no longer under her supervision.

A few days later, but still in September 2000, the applicant came to the deponent's new office and demanded the keys to her new office at the Government Complex. The deponent told her that she should first go and see the Director of Administration under whose instructions she (deponent) had locked the office. The applicant then left, saying she was going to the Director of Administration. That was the last time the deponent saw the applicant who had since neither came to her office nor reported for work at the Drafting section of the 1st respondent Ministry.

The deponent averred that she did not know if the applicant had any personal documents in the office in which the files and furniture she had been using were locked e.g passport and cheque book. The deponent would, however, have no objection to accompany the applicant into the office in which the files and the furniture she had been using were locked, for the sole purpose of collecting her

personal belongings, but certainly not to use the office or remove any Government property.

In my view, it is clear from prayer 1(b) and the facts disclosed by the affidavits that what the applicant wants is not only to remove her personal belongings from the office in which the files and the furniture she had been using are locked at the Government Complex. She wants access to that office so that she can use it pending finalisation of this application. That is what the deponent is objecting to because, in her contention, the applicant has been transferred to the Ministry of Justice and Human Rights where her office is waiting for her. After she had been transferred to the Ministry of Justice and Human Rights, the applicant simply has no office to use at the Drafting section of the 1st respondent Ministry. In the light of all what she had averred in her answering affidavit, the deponent denied, therefore, the applicant's averment that her transfer was actuated by nothing but malice.

The deposition of Ntebaleng Morojele-Maseela that the applicant had a negative attitude towards her and her transfer was not, therefore, motivated by malice, was corroborated by Semano Henry Sekatle who also deposed to an answering affidavit in which he averred that he was the Principal Secretary for the

2nd respondent Ministry. The responsibilities of his Ministry included, ***inter alia***, the promotion of efficient, stable and disciplined Public Service, in the Government of Lesotho. The deponent further averred that, over a period of time, he came to know of the conflict between the applicant and Ntebaleng Morojele-Maseela with the resultant inefficiency in the Drafting section of the 1st respondent Ministry. In order to resolve the problem, he was eventually requested to recommend to the Minister responsible for the Public Service to have the applicant transferred from the Drafting section of the 1st respondent Ministry to the Legal Aid Department of the Ministry of Justice and Human Rights. In that regard, he was furnished with annexures P.M.M.5 and P.M.M.7. A reading of the annexures left no doubt in his mind that there existed, between the applicant and Ntebaleng Morojele-Maseeela, a conflict with the resultant inefficiency in the Drafting section. Consequently, he did recommend to the Minister responsible for the Public Service that the applicant be redeployed from the Drafting section of the 1st respondent Ministry to the Legal Aid Department of the Ministry of Justice and Human Rights.

The Minister responsible for the Public Service, Pakalitha Bethuel Mosisili, also deposed to an answering affidavit in which he confirmed that he had been approached by Semano Henry Sekatle with a request to consider the redeployment

of the applicant from the 1st respondent Ministry to the Ministry of Justice and Human Rights. After considering the circumstances outlined in the affidavit of Semano Henry Sekatle and the recommendation made therein, the deponent decided, in the interest of efficiency, to transfer the applicant as recommended. He informed Semano Henry Sekatle of the decision and directed him to implement it. The deponent denied, therefore, the applicant's averment that her transfer had been actuated by malice and as a sort of punishment.

The 3rd respondent deposed to an answering affidavit in which he averred that he too was opposing the application on the grounds set out in the affidavits filed, on behalf of the 1st and the 2nd respondents. He further averred that he had appointed the firm of Webber Newdigate to represent all the respondents in this case.

It is clear from the facts, disclosed by affidavits, that the contention of the applicant is that she did not have a negative attitude towards Ntebaleng Morojele-Maseela, the head of the Drafting section in the 1st respondent Ministry. She had, therefore, a cordial working relationship with her. This is, however, denied by Ntebaleng Morojele-Maseela.

I have had the occasion to read through annexures P.M.M.4, P.M.M.5 and P.M.M.7 which leave me with no other impression but that the two ladies did not work happily together. In this regard, I find support in the answering affidavits of Semano Henry Sekatle and the Minister responsible for the Public Service who both averred that they too had read through the Annexures and got the same impression, *Viz.* that the working relationship between the applicant and Ntebaleng Morojele-Maseela was not harmonious, at all. Hence, the recommendation and the decision by Semano Henry Sekatle and the Minister responsible for the Public Service, respectively, to have the applicant transferred from the Drafting Section of the 1st respondent Ministry to the Legal Aid Department of the Ministry of Justice and Human Rights.

There was, in my finding, nothing wrong in separating, in the interest of the efficient running of the Drafting section of the 1st respondent Ministry, the applicant and Ntebaleng Morojele-Maseela by transferring the former from the Drafting Section of the 1st respondent Ministry. Assuming the correctness of my finding, the salient question that immediately arises for the determination of the court is whether or not the Minister responsible for the Public Service was empowered to redeploy/transfer as he did, the applicant. It was argued, on behalf of the applicant, that her redeployment or transfer from the position of Principal

Assistant Parliamentary Counsel (Grade H) she held in the 1st respondent Ministry to that of the Senior Legal Aid Counsel (Grade G) in the Legal Aid Department of the Ministry of Justice and Human Rights amounted to a removal from office or demotion. However, that was the prerogative of the Public Service Commission and ***NOT*** the Minister responsible for the Public Service. In this regard the court was referred to S. 137 (1) of the **Constitution of Lesotho, 1993.** The section reads:

> "137 (1) Subject to the provisions of this Constitution, the power to appoint persons to hold or act in office in the Public Service (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Public Service Commission."
> **(My underlings)**

I have underscored the words "to remove.....from office" in the above cited S. 137 (1) of the Constitution to indicate my view that in the context in which it is used the word "remove" means to dismiss from office and not just to change from one office to another. In this view, I find support in the Concise Oxford Dictionary (9th ed.) which defines the verb "remove" as meaning, ***inter alia,*** to get rid of; to eliminate; to cause to be no longer present or available. On the other

hand the word transfer is defined as meaning to change to another group, club, department, etc.

The facts disclosed by the affidavits leave no doubt, in my mind, that the decision of the Minister responsible for the Public Service was not that the applicant should be removed/dismissed from office. That was admittedly the function of the Public Service Commission and not the Minister. What the Minister did decide was that the applicant should be transferred/redeployed from the Drafting Section of the 1st respondent Ministry, where she had been doing the work of Principal Assistant Parliamentary Counsel, on salary scale Grade H (14), to the Legal Aid Department in the Ministry of Justice and Human Rights, where she would be doing the work of Senior Legal Aid Counsel which position was on salary scale Grade G (13). Annexure P.M.M.1, the instrument by which the applicant was transferred, made it quite clear that, apart from the fact of her transfer, the, applicant's other terms and conditions of employment remained the same. Thus, for example, she would be working as Senior Legal Aid Counsel which position was on salary scale - Grade G (13), but still be paid on salary scale - grade H (14) which was the salary she earned while working as Principal Assistant Parliamentary Counsel.

In deciding to transfer/redeploy the applicant, as he did, the Minister responsible for the Public Service did not, in my finding demote her. He merely exercised the powers vested in him by the **Public Service Act, 1995** of which subsection (2) (viii) of section 9 clearly provides, in part:

> "(2) Without limiting the generality of subsection (1), the Minister may make provision for all or any of the following matters:
> (i) .....
> (ii) .....
> (iii) .....
> (iv) .....
> (v) .....
> (vi) .....
> (vii) .....
> (viii) redeployment of public officers within the public service; ....."

Assuming the correctness of my finding, it follows that the question I have, earlier in this judgment, posted ***viz.*** whether or not the Minister responsible for the public service was empowered to transfer the applicant, as he did, must be answered in the affirmative. That granted, I am of the view that prayer (c) of the notice of motion cannot succeed. In my judgment, that is sufficient to dispose of the whole application and it will be merely academic to proceed to deal with the other prayers in the notice of motion.

In the result, this application ought to be dismissed with costs. It is accordingly ordered.

**B.K. MOLAI**

**JUDGE**

For Applicant : Mr. Matooane

For Respondent : Mr. Molyneaux