CIV/APN/474/98

IN THE HIGH COURT OF LESOTHO

In the matter between

TEBELO 'MOPA **APPLICANT**

and

TŠITSO RALIILE **1ST RESPONDENT**
MASERU LOCAL COURT **2ND RESPONDENT**
THE ATTORNEY-GENERAL **3RD RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 12th day of December 2001

In this application the Court is called upon to decide on a constitutional issue concerning the right to a fair trial or fair hearing in civil litigation in courts of law namely Central and Local Courts. The nub of the case advanced by the Applicant is that in a civil claim brought against him by the 1st Respondent before the Maseru Local Court (2nd Respondent) for payment of the sum of M10,000-00 damages arising out

of an alleged defamation of character, the 2nd Respondent denied him the right to legal representation.

I should state at this stage that the facts relative to this case are not in dispute and indeed the parties are on common ground that the 2nd Respondent refused the Applicant's application for postponement of the case in question in order to engage a legal practitioner on the ground that in terms of Section 20 of the Central and Local Courts Proclamation 62 of 1938 litigants in civil cases have no right to legal representation. This decision has prompted the Applicant to apply to this Court for an order couched in the following terms:-

"-1-

That a Rule Nisi be issued returnable on the date to be determined by this Honourable Court. (sic) Calling upon the 1st, 2nd and 3rd Respondents to show cause, if any, why an Order in the following terms shall not be made:

(a) The periods of notice provided for by the Rules of the above Honourable Court be dispensed with on account of urgency of this matter.

(b) Declaring that section 20 of Central and Local Courts Proclamation 62 of 1928 (sic) is inconsistent with section 12 (8) of the Constitution of Lesotho and therefore invalid to the extend (sic) that it does not permit legal representation in civil proceedings.

(c) That the proceedings in CC 97/98 between the Applicant and 1st Respondent be stayed pending the finalisation of these proceedings.

(d) Directing the 2nd Respondent to allow the Applicant to be represented in a certain civil matter: CC 97/98 by a legal practitioner of his choice

(e) That Respondents be directed to pay costs of this application jointly and severally.

(f) That Applicant be granted such further and/or alternative relief as this Honourable Court may deem just.

-2-

That Prayers 1 (a) and (c) operate with immediate effect as an interim interdict."

It was common cause between the parties at the hearing of this matter that the year 1928 appearing in prayer 1 (b) is a typographical error and that the correct year is 1938. By consent the prayer is amended accordingly.

A Rule Nisi was duly granted as prayed and in due course the 2nd

and 3rd Respondents filed their opposing papers. The 1st Respondent himself has not opposed this application and the Court shall assume in his favour that he will abide the judgment of the Court.

It requires to be noted at the outset that, to the extent that this application concerns the right to a fair hearing, it is a matter of particular constitutional importance not only as between the litigants themselves but also as laying down guidance for the future in civil litigation in Central and Local Courts in so far as the question of legal representation is concerned.

At this point I must say something about Section 20 of the Proclamation in question. It is an old piece of proclamation dating back to the colonial days. It did not emanate from the will of the people themselves but was imposed by the colonial masters, warts and all. The question that immediately arises in my view is whether this outdated piece of proclamation or more specifically Section 20 thereof is justifiable in an open democratic society based on freedom and equality

to the extent that it excludes the right to legal representation in civil cases coming before Central and Local Courts. I shall return in due course to this aspect. Suffice it at this stage to reproduce Section 20 of the Proclamation in question. It enacts as follows:

> "Every person who is charged with a criminal offence in a Central or Local Court shall be permitted to defend himself before the Court in person or by a legal representative of his own choice, who shall be a legal practitioner admitted to practice in the Courts of Basutoland. In civil proceedings no party may be represented by a legal practitioner, but shall appear himself; provided that the Court may permit the husband or wife, or guardian, or any servant, or the master, or any inmate of the household of any plaintiff or defendant, who shall give satisfactory proof that he or she has authority in that behalf, to appear and to act for such plaintiff or defendant."

Although this application is based on Section 12 (8) of the Constitution of Lesotho, on the right to a fair trial, it is necessary to consider this subsection in the context of the whole section more particularly subsections 12 (1) and 12 (2) (d). These subsections including 12 (8) guarantee the right to a fair trial in criminal as well as civil cases in the following words:-

"12 (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence-

(a) :
(b) :
(c) :

(d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;

:

(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within reasonable time." (My underlining).

As I will endeavour to demonstrate shortly subsections 9 and 10 are also crucial in arriving at a correct interpretation of subsection 12 (8). They provide as follows:-

"(9) Except with the agreement of all parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public. (My underlining).

(10) Nothing in subsection (9) shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority-

(a) may by law be empowered to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or

(b) may by law be empowered or required to do in the interests of defence, public safety or public order." (Emphasis added).

Before proceeding any further it is no doubt necessary to record at this stage that this application is opposed by the 2nd and 3rd Respondents, not essentially from a constitutional law view-point, as I see it, but on the

ground that the Central and Local Courts have no legal training to deal with legal practitioners. The President of the2nd Respondent, 'Matebello Ratsuba, puts the point briefly as follows in paragraphs 6 and 7 of her Answering Affidavit:-

"6.

> .....One must look at the intention of the legislature behind the enacting of Section 20 of the Central and Local Courts Proclamation of 1958 (sic). Much as these courts have concurrent jurisdiction with the High Court, the really important issue is that the personnel in those courts, for instance the president, are not legally trained (sic) they apply simple Basotho Principles. Therefore the fact that they are not on par with legal representatives would jeopardize the functioning of these courts.

7.

> .....This measure that he (Applicant) has taken is drastic and will set a precedent which the personnel of the Local and Central Courts cannot cope with especially taking into consideration their level of training."

Apart from the misleading nature of the deponent's allegation that the Central and Local Courts have concurrent jurisdiction with the High Court, I observe in passing that her concern about the fact that those

courts have no legal training becomes meaningless or indeed irrelevant when one has regard to the fact that legal practitioners are in fact allowed the right of audience before the same courts in criminal cases in terms of Section 20 of the Proclamation. Regrettably Mr. Makhethe for the Respondents has found it fit to argue along the same lines as the deponent and I regret to say that I find such argument unhelpful and devoid of merit when considered in the light of the constitutional order brought about by Section 12 of the Constitution on the right to a fair trial and/or fair hearing guaranteed in criminal cases as well as in civil cases.

It is now trite law that in interpreting a constitutional provision or indeed any statute it is permissible for the court to have regard to the purpose and background of the legislation in question. See Molapo v DPP 1997-98 LLR 197; 1997-98 LLR & LB 384. (Also reported in 1997 (8) BCLR (Lesotho) 1154). I turn then to consider this aspect.

The Historical Legal Background

History tells us that in 1868 the Founder of the Basotho Nation,

Moshoeshoe I, succeeded to have Lesotho (then Basutoland) brought under the British Government as a Protectorate. Thereafter the policy of Great Britain in its rule over Lesotho was clearly one of non-committal to worthwhile expenditure in the development of the country initially preferring indirect rule of the country by the Cape and also preferring the Basotho people to look after their own administration to a large extent. Britain only assumed direct imperial control of the country on 18 March 1884 after Lesotho had rebelled against the indirect rule by the Cape through regulations and disarmament legislation that led to what became knows as the War of the Guns in 1880. Chiefs continued to rule the people subject to the ultimate control of Britain but the administration was largely financed through what was known as the hut tax which was collected from the Basotho themselves.

It was in the context set out above that the Central and Local Courts Proclamation was finally enacted in 1938. The Proclamation stated the following as its object: "to make provision for the recognition, constitution, powers and jurisdiction of Central and Local Courts and

generally for Administration of Justice in cases cognisable by Central and Local Courts." More importantly these courts were confined to administering the "native" law and custom prevailing in the Territory but only in so far as it was not repugnant to justice or morality judged by the Western standards. Thus a perception was created that native law (now customary law) was potentially inferior or unacceptable unless it received the approval stamp of the Western standards. It was in this context that legal representatives were prohibited in civil cases in the Central and Local Courts.

In 1966 Lesotho attained independence under the Westminster Constitution which contained a Bill of rights including the right to a fair trial. That Constitution was however suspended in 1970 by the late Chief Leabua Jonathan who proceeded to rule by decree until he was himself toppled by the Military in 1986.

The 1993 Constitution

In 1993 the Military returned the country to civilian rule and the

present Constitution of Lesotho was ushered in. It is important to note that Chapter II of the Constitution guarantees protection of fundamental human rights and freedoms including, in so far as it is relevant to this case, Section 4 (1) (h) which reads as follows:-

> "4 (1) Whereas every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms, that is to say, to each and all of the following -
>
> (a) .....
> (b) .....
> (c) .....
> (d) .....
> (e) .....
> (f) .....
> (g) .....
>
> (h) the right to a fair trial of criminal charges against him and to a fair determination of his civil rights and obligations;
>
> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and

freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest. (Emphasis added).

(2) For the avoidance of doubt and without prejudice to any other provision of this Constitution it is hereby declared that the provisions of this Chapter shall, except where the context otherwise requires, apply as well in relation to things done or omitted to be done by persons acting in a private capacity (where by virtue of any written law or otherwise) as in relation to things done or omitted to be done by or on behalf of the Government of Lesotho or by any person acting in the performance of the functions of any public office or any public authority."

It is further important to note that Section 85 of the Constitution entrenches fundamental human rights and freedoms including the right to a fair trial and/or fair hearing to the extent that any bill to alter them shall not be submitted to the King for his assent unless the bill in

question has been submitted to the vote of electors qualified to vote in the election of the members of the National Assembly and provided further that the majority of the electors so voting have approved the bill.

Interpretation

In determining whether or not Section 20 of the Proclamation is consistent with Section 12 of the Constitution and, if so, what remedy obtains, it is no doubt necessary to refer to Section 2 of the Constitution which enacts as follows:-

> "2. This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void."

It follows from the aforegoing considerations therefore that Section 20 of the Proclamation is subordinate to the Constitution and that its validity must accordingly be tested against the right to a fair trial and/or fair hearing as enshrined and protected in Sections 4 (1) (h), 12 (8) (9) (10) and 85 of the Constitution quoted above. See Seeiso v Minister of

Home Affairs and Others 1998 (6) BCLR 765 (LES CA) at 775 per Steyn AP (as he then was).

There is need to emphasise that the Constitution has ushered in an entirely new human rights culture which was unknown when the Central and Local Courts Proclamation 1938 was made. The Constitution has now guaranteed protection of fundamental human rights and freedoms to which every subordinate law, including Section 20 of the Proclamation must conform. As this Court said in Molapo's case supra, after seeking guidance from commonwealth jurisdictions (for which it is strictly unnecessary to repeat the exercise herein), Section 12 of the Constitution on the right to a fair trial or hearing must be given a generous and purposive interpretation to ensure maximum enjoyment of the fundamental right guaranteed therein.

In my view the validity of Section 20 of the Proclamation in so far as legal representation in civil cases is concerned has to be tested in two stages, firstly, as against the common law and secondly, as against

Section 12 of the Constitution.

Section 20 (Legal Representation) and Common Law

It must be said at the outset that Mr. Makhethe for 2nd and 3rd Respondents made a startling submission that there is no right to legal representation in civil cases at common law. With respect such a proposition has merely to be articulated to be rejected. Nothing can be further from the truth and, in my view, once Mr. Makhethe misconstrued the law in this regard, as he no doubt did, it was always inevitable that he would misconstrue the whole case in the instant matter. A few authorities should suffice to highlight the common law position with regard to the right to legal representation.

In Dabner v South African Railways and Harbours 1920 AD 583 at 598 Innes CJ reaffirmed the legal position that the right of legal representation is established at common law. The same view was taken in Mandela v Minister of Prisons 1983 (1) SA 938 (A) at 957 where

Jansen JA writing a unanimous decision of the Court expressed himself as follows:-

> "The right of access to one's legal adviser, as a corollary of the right of access to the courts, is a basic or fundamental common law right. *(R v Slabbert and Another* 1956 (4) SA 18 (T) at 21G; *Brink and Others v Commissioner of Police* 1960 (3) SA 65 (T) at 67C-E; cf *S Selikowitz* 1965/1966 *Acta Juridica* at 51 et seq.)"

Continuing in the same vein at 957 G-H the learned Judge of Appeal stated the following :-

> "The precise parameters of the basic common law right in question need not be defined for present purposes, but it may be mentioned that an important element is that of being able to consult with the legal adviser privately and confidentially."

In Commander of LDF & Others v Rantuba & Others 1999 - 2000 LLR & LB 95 at 97-98 the Court of Appeal of Lesotho, the highest Court in the country, put the legal point beyond doubt in the following terms:-

> "At common law there is a right of access to a legal adviser,

described as "basic" or "fundamental" (see **Lee Kui Yu v Superintendent of Labourers** 1906 TS 181 at 187; **R v Slabbert** 1956 (4) SA 18 (T) at 21G; **Brink and Others v Commissioner of Police** 1960 (3) SA 65 (T); **S v Seheri** 1964 (1) SA 29 (A) at 36; **S v Shabangu** 1976 (3) SA 555 (T) at 558, and see generally Selikowitz 1965/66 *Acta Juridica* 51 *et seq*).

The right of access for the purposes of obtaining legal advice may exist even where a right to legal representation has been lawfully excluded. Its importance is particularly marked because often it is only through access to legal advice that a person may be able to exercise other rights.

The onus of justifying any infraction of the right to legal access is on the party who asserts an entitlement to its attenuation (see ***During N.O. v Boesak*** 1990 (3) SA 661 (A) at 673 G-H and 674B-C; **Minister of Justice v Hofmeyr** 1993 (3) SA 131 (A) at 153 D-I). The right is retained by a person who is incarcerated, unless it is taken away by express statutory provision or by necessary implication (**per Innes JA in Whittaker v Roos and Bateman** 1912 AD 92 at 122-2; see also **Goldberg v Minister of Prisons** 1979 (1) SA 14 (A) at 39 C - E (per Corbett JA dissenting); **Mandela v Minister of Prisons** 1983 (1) SA 938 (A) at 957 D-F; **Minister of Justice v Hofmeyr** *supra* at 141 C-G)."

It follows from the aforegoing authorities that the legal principle is well settled that the right to legal representation is available at common law as a basic or fundamental right. Once that is so I am respectfully attracted by the following remarks of Jansen JA in Mandela v Minister of Prisons (supra) at 957 E-F:-

> "On principle a basic right must survive incarceration except insofar as it is attenuated by legislation, either expressly or by necessary implication, and the necessary consequences of incarceration."

At the very least what the above quotation means, as a starting point in the context of this case, is that unless the Constitution itself excludes the common law right to legal representation in civil cases, either expressly or by necessary implication notwithstanding its guarantee to fair trial or hearing, such right must survive incarceration.

It is true to say that Section 20 of the Proclamation categorically excludes the right to legal representation in civil proceedings but this has to be considered in the light of the fact that this is a product of colonial

days before the advent of the constitutional order guaranteeing fundamental human rights and freedoms. In any event it seems a strange anomaly that in terms of Section 20 of the Proclamation legal practitioners are permitted in criminal cases before Central and Local Courts while they are prohibited in civil cases before the same courts. There seems no justification for this apparent discrimination which can no longer stand the scrutiny under Section 18 of the Constitution. That section provides that "no law shall make any provision that is discriminatory either of itself or in its effect."

Nor can Section 20 of the Proclamation bear scrutiny as against Section 19 of the Constitution on the right to equality before the law. That section enacts that "every person shall be entitled to equality before the law and to the equal protection of the law."

Judged in the light of the aforegoing considerations it no doubt seems a further anomaly that while litigants are denied the right to legal representation in terms of Section 20 of the Proclamation "relatives" or

"inmates" of the litigants are allowed the right of audience. As I have said above, this offends against the right against discrimination (Section 18 of the Constitution) and the right to equality before the law and the equal protection of the law (Section 19 of the Constitution). There is absolutely no justification for this arbitrary differential treatment in this day and age under the new Constitutional order based on democratic principles of equality, openness, transparency and accountability. See Molapo's case (supra).

In this regard I am in respectful agreement with the following remarks of Lord Denning M.R. in Pett v Greyhound Racing Association Ltd 1968 (2) ALL ER 545 at 549 in dismissing the contention, as in *casu*, that if legal representation were allowed as of right, this would result in delay and complications:-

> "I cannot accept this contention. The plaintiff is here facing a serious charge. He is charged either with giving the dog drugs or with not exercising proper control over the dog so that someone else drugged it. If he is found guilty, he may be suspended or his licence may not be renewed. The charge concerns his reputation and his livelihood. On such an inquiry, I think that he is entitled

not only to appear by himself but also to appoint an agent to act for him. Even a prisoner can have his friend. The general principle was stated by STIRLING, J. in *Jackson & Co. v Napper, Re Schmidt's Trade Marks* (2):

> ". . . that, subject to certain well-known exceptions, every person who is *sui juris* has a right to appoint an agent for any purpose whatever, and that he can do so when he is exercising a statutory right no less than when he is exercising any other right."

This was applied to a hearing before an assessment committee in the case of *R v St. Mary Abbots, Kensington Assessment Committee* (3). It was held that a ratepayer had a right to have a surveyor to appear for him. Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: "You can ask any questions you like"; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor."

Significantly Lord Denning concluded by stating that where a man's reputation or livelihood or any matters of serious import are concerned natural justice then requires that he can be defended, if he

wishes, by counsel or solicitor. I respectfully agree. I might add that for a poor country like Lesotho a claim for M10,000-00 such as the one faced by the Applicant before the 2nd Respondent in the Maseru Local Court is a huge claim of serious import. Indeed it must equally be borne in mind that the monetary ceiling of civil jurisdiction of Central and Local Courts is a huge sum of M15,000-00. Quite clearly legal representation thereat is absolutely necessary.

Mr. Makhethe for 2nd and 3rd Respondents relies on the following remarks of Cotran J, as he then was, in Lepolesa Mahloane and Others v Julius Letele 1974-75 LLR 255 at 256 for the proposition that the striking down of Section 20 of the Proclamation will lead to inconvenience and delays in the disposal of civil cases before the Central and Local Courts:-

> "The Legislature, in its wisdom, decided that legal practitioners are barred from appearing in these courts. This applies to both parties to a suit, and is not obviously *per se* a reason for transferring a case otherwise the courts will be frustrating the will of the legislature. The courts are bound by this law as everyone else. The High Court

> in numerous decisions has insisted on something more. If one considers this matter closely one finds many good reasons why legal practitioners are not allowed. There are several dozen Local Courts dotted around the country. They are easily accessible to most people, and at little expense; the nature of the disputes are simple and can adequately be dealt with by those courts. Added to that is the fact that when this Proclamation was passed in 1938, communications were difficult, there were bad roads and no airstrips, few cars, and fewer lawyers and virtually no facilities for accommodation in villages. If representation was allowed as of right cases would not be completed and one or other party would be able, through delay, virtually to defeat the ends of justice. If it is time for a change, it should come from Parliament, not by judicial pronouncement. If I may add, similar provisions are in force under the legal systems of three countries in Africa where I have had the privilege to serve."

In Macheli and Another v Sesiu 1976 LLR 212 Mofokeng J, as he then was, also appeared to justify the prohibition of legal practitioners in Central and Local Courts on the ground that the proceedings in those courts were to be simple and uncomplicated by technicalities such as legal practitioners were perceived to bring about. It seems to me, however, that this view is an insufficient justification to trample on other people's guaranteed constitutional rights. In any event it is salutary to note that for full 63 years since the Proclamation came into effect in 1938 the pessimism expressed by the two learned judges above has never been

evident in practical terms in criminal cases where legal representatives have always appeared in those Courts without any complications. One would have thought, for that matter, that as officers of the Court the presence of legal representatives will be to the assistance and benefit of those Courts. I have no doubt in my mind that fundamental human rights and freedoms are much more important than considerations of inconvenience. Judged from this context I have little doubt that the advantages to be gained from legal representation in civil cases in Central and Local Courts far outweigh the perceived disadvantages.

As I have pointed out earlier the sentiments expressed in Mahloane & Others (supra) and Macheli and Another (supra) were rejected in Pett's case (supra) and I have no doubt that Lord Denning's remarks reflect the correct legal view point on the matter.

In fairness to Cotran and Mofokeng JJ, they made the decisions referred to above long before the advent of fundamental human rights and freedoms brought about by the Constitution and indeed it must be borne

in mind, as a matter of legal history, that in March 1975 when Cotran J made that decision the 1966 Constitution which contained a Bill of Rights was still under suspension having been suspended by Chief Leabua Jonathan in 1970 as pointed out earlier. Similarly Mofokeng J made his decision in similar circumstances on 29th October, 1976.

As I have said previously the 1993 Constitution has re-introduced fundamental human rights and freedoms against which Section 20 of the Central and Local Courts Proclamation must now be tested. It follows from these considerations, in my view, that the Mahloane and Others case (supra) and Macheli and Another v Sesiu (supra) as well as similar other decisions must no longer be regarded as good law in this country.

Section 20 of the Proclamation versus Section 12 (8) of the Constitution

In my view, and following what has been said above, what Section 12 of the Constitution does is no more than to restate one of the tenets of the common law principle of natural justice which dictates a fair trial

and/or hearing and let me state categorically that, although there is no express mention of the right to legal representation in civil cases, its protection can easily be inferred from the whole text of Sections 4(1)(h) and 12(8), (9), (10) and (11) of the Constitution.

As has been pointed out above Section 4 (1) (h) of the Constitution guarantees to "every person in Lesotho" the right to fair trial of criminal charges against him and to a fair determination of his civil rights and obligations.

Subsection 12 (8) on the other hand guarantees a fair hearing for the determination of the existence or extent of any civil right or obligation before any court.

Subsection 12(9) enacts that all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any adjudicating authority, including the announcement of the decision of the court or other authority, shall be

held in public.

It requires to be emphasised that both subsections 12(8) and 12(9) of the Constitution guarantee a fair hearing in civil proceedings in any court without distinction. Since Central and Local Courts are courts of law and not simply administrative tribunals (see Attorney-General v Makesi and Others 1999-2000 LLR & LB 306 at 314), these subsections apply equally to them. Indeed the Central and Local Courts are established as subordinate "courts" in terms of Section 118 of the Constitution. As I have pointed out previously the Constitution is the supreme law to which these courts are subordinate (see Section 118 (2) of the Constitution).

Subsection 12 (10) of the Constitution is even more instructive as to the right to legal representation in civil cases in as much as it specifically enacts that nothing contained in subsection 12 (9) shall prevent the court or other adjudicating authority from excluding from the proceedings in civil litigation persons "other than the parties thereto and

their legal representatives." The importance of this subsection lies in the fact that "legal representatives" are not hit by the limitation clause or more specifically, the court's right to exclude parties from proceedings before it as it deems fit. This must surely apply to all courts including Central and Local Courts. Were it otherwise, I have little doubt that the framers of the Constitution would have said so in clear and unambiguous terms. On the contrary they clearly envisage the presence of "legal representatives" in civil cases in all courts including Central and Local Courts.

Put differently, and as was decisively held by the Court of Appeal in Commander of LDF & Others v M. Rantuba and Others (supra) at 102, the common law right of legal access has not been removed by the Constitution. This must surely put paid to Mr. Makhethe's submission that the Constitution contains no express provision for legal representation in civil cases and that consequently such right does not exist.

It follows from the aforegoing considerations that the prohibition to legal representatives in civil cases in Central and Local Courts is no longer justified in terms of the Constitution whatever the perceived motivation for such prohibition may have been during the colonial days. More importantly the prohibition is, in my view, clearly inconsistent with the Constitution which now guarantees fundamental human rights and freedoms as well as full recognition to the courts and laws of the country on equal par with any democratic free nation anywhere in the world.

I would emphasise that the basic concept that the Constitution guarantees in civil proceedings in all courts in terms of Sections 4(1)(h) and 12(8), (9) and(10) of the Constitution is "fair hearing" in accordance with the principles of natural justice. To deny a person legal representation in civil proceedings in a court of law is no doubt a denial of justice itself. It offends against the age-old principle of natural justice at common law. In this regard the celebrated dictum of Lord Herwart in R v Sussex Justices, *ex parte* McCarthy (1924) 1 KB 256 at 259 more than 77 years ago is still instructive namely that "justice should not only

be done, but should manifestly and undoubtedly be seen to be done."

I have in this judgment deliberately used the term "fair trial" with the term "fair hearing" interchangeably as I consider that, in the context of Section 12 of the Constitution, one concept includes the other. In my view, there can be no fair trial without fair hearing and the vice versa.

There is no doubt that the right to legal representation is an essential feature of the right to a fair trial as it ensures that the accusatorial system which is itself the cornerstone of a fair trial in the common law tradition produces a just result and that litigants have adequate opportunity of stating their cases.

See S v McKenna 1998 (1) SACR 106 (C); Strickland v Washington 468 US 685 (1984) and Ross v Moffit 417 US 600 (1974).

Indeed I.M. Rautenbach: Constitutional Law 3rd edition at 378 correctly observes that "the right to fair trial forms the basis for affording

constitutional recognition to various rights relating to civil litigation." It is, however, the next sentence by I.M. Rautenbach that has motivated Mr. Makhethe to conclude in his heads of argument that "the Constitution provides no guarantee or right to legal representation in civil proceedings" merely because there is no specific mention of legal representation in civil litigation in the sentence. That sentence reads as follows:-

> "These rights apply to matters such as the composition and impartiality of the courts, the equality of the parties, information concerning the hearing and the opposition's case, the opportunity to be heard and to adduce evidence, control by the litigants over proceedings, motivated decisions by the courts and the right to appeal."

As I read the above quoted passage by I.M. Rautenbach, I do not think that he intended to give an exhaustive list of the various rights relating to civil litigation. I say this because the learned author uses the term "such as". Clearly he was, in my view, merely giving examples of some of the "various" rights relating to civil litigation, but certainly not all of such rights. There can be no doubt that the right to legal

representation in civil litigation is one such right.

On a conspectus of all the aforegoing considerations I hold that the right to a fair trial or hearing guaranteed in Section 12 of the Constitution includes the right to legal representation and that it applies equally in criminal cases as well as civil cases. Similarly I hold that Section 20 of the Central and Local Court Proclamation 62 of 1938 is inconsistent with Section 12 (8) of the Constitution and therefore invalid to the extent that it does not permit legal representation in civil proceedings in Central and Local Courts. See Bingindawo and Others v Head of the Nyanda Regional Authority and Another; Hlantlalala v Head of the Western Tembuland Regional Authority and Others 1998 (3) SA BCLR 314 (TK).

The case of Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee 2000 (3) ALL SA 415 (C) which was so heavily relied upon by Mr. Makhethe for 2nd and 3rd Respondents is distinguishable from the instant case. That case had nothing to do with constitutionalism or constitutional law. As the

respondent's name indicates, it was purely an administrative matter before an administrative disciplinary body. It was therefore not a civil case before a court of law as in *casu* and it need hardly be mentioned that different legal considerations apply in the two scenarios and that there is no automatic right to legal representation in administrative hearings.

In the result, the rule is confirmed and the application granted in terms of prayers 1 (b) and (d) of the Notice of Motion.

For the avoidance of doubt and as guidance in future civil litigations coming before the Central and Local Courts I hereby make the following declaratory order:-

It is hereby declared that Section 20 of the Central and Local Courts Proclamation 62 of 1938 is inconsistent with Section 12 (8) of the Constitution of Lesotho and therefore invalid to the extent that it does not permit legal representation in civil proceedings.

This being an important constitutional matter there shall be no order as to costs as it does not seem to me proper to punish the Respondents with costs in a constitutional law development as in *casu*. I should add that Adv Mda for the Applicant has very fairly and properly conceded that there should be no order as to costs.

M.M. Ramodibedi
JUDGE
12th December 2001

For Applicant : Adv Z. Mda
For 2nd and 3rd Respondents: Mr. T. Makhethe