CIV/APN/40/02
CIV/T/374/01

IN THE HIGH COURT OF LESOTHO

In the matter between :

MOEKETSI EDWARD KHALI	**APPLICANT**
vs	
COLIN ADDIS	**1st RESPONDENT**
LESOTHO BANK (1999) (PTY)LIMITED	**2ND RESPONDENT**
DIRECTOR OF PRISONS	**3rd RESPONDENT**
ATTORNEY-GENERAL	**4th RESPONDENT**

JUDGMENT

Deliverd by the Hon. Mr. Justice M.L. Lehohla on the 5th day of February, 2002.

On 30th January, 2002, Mr. Sekake for the applicant appeared before me in chambers to move the above application.

The Court observed that papers had been filed of record in the registry of this court and served on respondents on 29th January, 2002.

Although Mr. Wessels for the 1st and 2nd respondents was in attendance

having filed the notice to oppose also appeared at the same time on the same day as did counsel for the applicant, he did not however file any opposing affidavits on behalf of his clients but opted to argue the matter from purely legal stand point.

Mr. Sekake raised scrupples about Mr. Wessels's appearance and discouraged the Court from hearing the matter in open Court. This in a sense was a matter of surprise to me because both counsel for the respective parties were robed for appearance in open Court. The Court while heeding Mr. Sekake's reservations about hearing the matter in open Court did indicate to him that the fact that the respondents were served and notified of the day and time the matter was going to be moved was a conscious invitation to them by the applicant to appear if they wished on the stated day and time, either in person or as happened in the instant matter through their Counsel who is an officer of this court who has the right of audience in this Court as far as I am concerned. Thus this court made it plain for the above reasons that it could not prevent Mr. Wessels from representing his clients and safeguarding their interests in the ongoing proceeding even if he himself or his briefing attorneys i.e. Messers Webber Newdigate & Co represented by Mr. Roberts, did not deem it necessary to file any apposing affidavits in this matter.

I may just add for emphasis that Nathan **et al** in the 1965 edition of **Uniform Rules of Court** state that rule 6 (5) (d) at pages 32 to 34 provides that : " Any person opposing the grant of an order sought in the notice of motion shall :

(i)

(ii)

(iii) if he intends to raise any question of law only (sic) **he shall** deliver notice of his intention to do so, ...".

sub-rule 6 (11) provides that :

"Notwithstanding the aforegoing sub-rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge".

sub-rule 6(12) (a) provides that:

"In urgent applications the court or a judge may dispense with the

forms and service provided for in these rules and may dispose of such matter at such time and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet".

In going about this matter which was moved on basis of urgency albeit on notice, the court has tried to observe the spirit of the above cited sub-rules. Special regard has been had to the plight in which the 1st respondent is placed by application moved in the peculiar circumstances against him for as drastic a relief as his arrest to found and confirm this court's jurisdiction.

The applicant has approached this court through a notice filed on 29th January, 2002 seeking a **rule nisi** calling upon the respondents to show cause [on the return day] why:-

(a) The 2nd respondent shall not be ordered to freeze and retain any funds due and accruing in future to the 1st respondent (sic) any such funds which are to be paid to 1st respondent as salary and benefits due to him in terms of service with Lesotho Bank 1999 (Pty) Ltd and 1st respondents (sic) travelling documents forthwith pending the

outcome of the matter in CIV/T/374/2001 instituted by applicant against 1st respondent.

OR ALTERNATIVELY

(a) (i) "The Deputy Sheriff shall not be ordered to attach, take into and retain in his possession certain (sic) immovable property; to wit, 1st respondent's motor vehicles of description and registration unknown to the applicant, pending the final decision in action instituted against 1st respondent by applicant in CIV/T/374/2001".

(b) 1st respondent shall not be ordered to pay security to the satisfaction of the Deputy Sheriff or be placed in custody in the hands of the director of prisons pending the outcome of this application.

(c) 1st respondent shall not be ordered to abide the outcome of the proceedings in CIV/T/374/2001 instituted by applicant against 1st respondent ".

Following especially from the text of averments (a) (i) and (b) and in the

absence of any submission to the contrary it appears that the assumption by Mr. Wessels is valid that this application at least in essence appears to be for an arrest of the 1st respondent **suspectus de fuga**.

After Mr. Sekake in his main address had taken the court through the applicant's averments in the founding papers, Mr. Wessels whose side hadn't filed any answering affidavits, as expected raised legal points in limine.

I may just add that adopting the procedure Mr. Wessels followed is justified where the applicant's own papers provide sufficient answer or defence to charges levelled against the respondent. This procedure has the merit of avoiding unnecessary expenses to be incurred by either of the parties were the matter to be heard on the return date. It also avoids waste of the Court's time. (More of this later).

Mr. Wessels referred the Court to **African Realty Trust vs Sherman** 1907 (The citation of which is not clear but I was supplied with a photocopy) reflecting Wessels J's remarks made on 25 March, 1907 at p 36 where that learned judge said

"Now our law will not lightly allow any infringement of a man's personal

liberty; and when the process of the law is invoked to interfere with a man's personal liberty, all the formalities for so doing must be complied with. ..... It is the duty of a petitioner in such a case to set out clearly and fully the grounds on which he claims the person, whom he suspects is about to flee the jurisdiction, owes him money". I am in respectful agreement with this important statement of the law.

One other reason Counsel for the 1st respondent deemed it unnecessary for his client to file any answering affidavit was founded, in my view, on the applicant's failure to heed the provisions of Rule 6 of the High Court which in simple language says:-

"(1)The court may on application grant leave for property of a **peregrinus** which is in Lesotho to be attached in order to give the court jurisdiction in an action which the applicant intends to bring against such **peregrinus**".

In the instant matter the contemplated action had already been instituted in CIV/T/374/2001 when the applicant moved the instant application. In my view compliance with the above rule requires that an application be moved before the institution of the contemplated action.

Paragraphs 11 and 12 of the applicant's founding affidavit which provide an irresistible notion that the instant proceeding is an application **suspectus de fuga** fall far short of meeting the prerequisite that the applicant's averments should provide a full and clear information on the basis of which the court could feel confident that it is proper and legitimate to grant the relief sought. In none of the averments is it stated that the 1st respondent intends to remove in order to evade his responsibilities to the applicant. Instead the reason furnished for the 1st respondent's apprehended departure is either that the 1st respondent is being transferred or retrenched by his employer the Lesotho Bank i.e. 2nd respondent. Thus his departure cannot by any stretch of imagination be motivated by an intention to avoid his responsibility. Given this set of circumstances it would be redundant for the 1st respondent to file an answering affidavit to tell the court what has generously and gratuitously been done on his behalf by the applicant. See Annexure "A" to applicant's founding affidavit. On this basis the applicant's case smacks of failure to measure up to the requirement laid down in **Getaz vs Stephen** 1956 (4) SA 751 D where Broome JP at 755 had this to say:-

> "In my opinion the procedure of arrest was not devised to prevent a debtor's departure from the Court's jurisdiction but to prevent his flight, that is to prevent his departure with the intention of evading

or delaying payment".

It is important to appreciate that the learned judge in dismissing a submission as too technical and too little to the point to give serious consideration to it said:

> ".....Mr. Hosking's submits that ..... a debtor must be presumed to intend the natural consequences of his act and that consequently if the natural consequences of departure will be to defeat or delay his creditor's claim, he must be presumed so to have intended. In my opinion that view is too technical. We are not primarily concerned with the effect of the respondent's departure but with the intention of that departure.....".

The learned judge rams the point home at G in a manner that I can scarcely conceal my utmost concurrence therewith as follows:

"In my opinion a departure with the intention of defeating a creditor's claim means a departure undertaken with the object and/or that purpose. .....of course

the fact that a departure will defeat or delay a creditor's claim is a circumstance to be taken into account with all the other circumstances in deciding whether an intention to defeat or delay may reasonably be inferred".

For the applicant to succeed it is absolutely essential that he furnish proof that the respondent's reason for departure is to avoid his obligation towards the applicant.

In reaffirming the dictum extracted from **Getaz** above Nepgen J in **Sanddune** CC vs **Catt** 1988 (2) SA 461 had this to say

> "As was pointed out by Broome JP in **Getaz vs Stephen** 1956 (4) SA 751 D at 755 D, the procedure of arrest was not devised to prevent the departure of a debtor from the jurisdiction of the Court, but to prevent him from departing with the intention of evading or delaying payment of his indebtedness ".

Another authority worth being given due consideration on account of the light it throws on matters of the instant nature is **Mfeya vs Wilson** 1995 (1) SA

420 (T) at 422 F where White J succinctly highlighted the importance of the principle involved by saying:

> "As the writ concerns the personal liberty of an individual, failure to prove any one of the prerequisites would well be fatal to the writ, either before or after its issue".

In casu nowhere has it been alleged in the applicant's founding affidavit that the 1st respondent intends to or is on the verge of leaving Lesotho with the intention of evading the applicant's claim or any judgment which might be granted against him.

One other feature that is unsatisfactory is that both summons and plaintiff's declaration make it plain in CIV/T/374/2001 that the defendant therein who is the 1st respondent herein is not sued in his personal capacity.

The summons reads :

> "INFORM : **COLIN ADDIS** an ex-patriate, male person whose further and better particulars (sic) unknown to plaintiff

sued herein in his capacity as managing director of Lesotho Bank Limited". (Emphasis supplied)

"Defendant is ex-patriate, male person, **currently appointed chief executive of Lesotho Bank, sued herein in his capacity as such** ". (Emphasis supplied)

It becomes plain to me reading from the two passages above that the applicant himself cannot have seriously contemplated that the 1st respondent would feel the need to escape his responsibility to meet the claim preferred by the plaintiff because the 1st respondent is not being sued in his personal capacity. Thus he should have nothing to fear, nothing to run from according as common sense serves. The applicant's averments in his affidavit placed side by side with the above extracts from his summons amount to an untenable phenomenon in law known as blowing hot and cold. On the one hand it is said the applicant will flee, yet at once we are told that the charges are not preferred against him in his personal capacity. Such a situation is at all times unacceptable. Demurring a similar situation in CIV/APN/23/97 (unreported) at page 27 **infra** this Court said : "That the applicant at once denies and recognises the existence of the situation set out above is a typical example of blowing hot and cold;

a factor which at all times fails to meet with the light of the Court of law's countenance". Moreover a legal principle strongly favours the 1st respondent in this connection that words or statements appearing in any text the purport of which results in confusion or senselessness have to be interpreted against the author - in this regard the applicant.

Next after this unsatisfactory state of affairs comes an inexcusable factor that the extract Annexure "A" abstracted from a newspaper relied upon by the applicant to found his claim of defamation against the respondents is that it has been filed just as a copy without any original publication.

The law demands that an original publication should be filed and it should bear the requisite revenue stamps. In the result all the applicant relies on is a document styled a "fair translation". In my view this document has serious defects of its qualities. To the extent that it is a publication addressed perhaps to the Editor of the newspaper believed to be "Mohahlaula" without any proof that it in fact is such, is hearsay. To the extent that the Editor makes publication of its contents relying on undisclosed source makes the publication a double hearsay. Thus the said document becomes doubly inadmissible. I therefore rule its contents so.

The law has time and again laid down that one has to be careful if one introduces hearsay evidence. The source has to be revealed or else introduction of hearsay evidence is embarked upon at the originator's peril as to costs.

The letter is itself not published. Thus it is not clear whether the claim is for defamation or **is ad injuriarum**.

Looking at the letter itself one would pay pounds to find if it defames at all. But that is a matter best left to the trial court in the action. It is however necessary that the letter be reproduced warts and all in this judgment since reference has been made to it in Annexure "A" and elsewhere in the applicant's papers.

It reads :

Lesotho Bank (1999)Ltd

September 25, 2000

The Managing Director

Khali Hotel (Pty) Ltd

P.O. Box 1072

Maseru 100

Dear Sir,

APPLICATION FOR A LOAN

Five Hundred Thousand Maloti (500 000.00)

I acknowledge receipt of your letter dated 11th September, 2000. My investigations have led me to believe that you may be connected with certain overdrawn accounts that have remained with the Old Lesotho Bank, which are irregular and require acceptable arrangements for repayment to be made.

In the circumstances I regret to advise you that unless we are satisfied that all lending related matters relating to yourself or your company have been regularised we will not be in a position to consider your loan application.

If you wish, please feel free to call and discuss matters. Before calling please phone beforehand to agree a mutually convenient time for a meeting.

Yours Faithfully

Signed : Colin Addis

Executive Director

Cc : Senior Manager, Old Lesotho Bank

Corporate Manager".

It is the above letter that has invoked all the litigation in both CIV/T/374/2001 and in turn the instant application.

I have relied on **African Realty Trust** for the view that formalities have to be strictly complied with in matters involving putting personal liberty of others in peril.

Schutz P re-echoing the importance of forms in **Kutloano Building Construction vs Matsoso and Others** LAC 1985 - 89 p 99 at p 103 said:

> "I am afraid that my decision may smack of the triumph of formalism over substance. But forms are often important and the requirements of the sub-rule are such".

I have had occasion to repeatedly emphasise that causes are lost where forms are ignored or overlooked. The law has enjoined that original papers must be filed if their contents are relied upon and are to be given weight. This was not done. Surely it must be at the applicant's peril.

Harking back to hearsay evidence it would be important to have regard to the

authority of **Geanotes vs Geanotes** 1947 (2) SA 512 (p1) where Herbstein AJ said :

> "It will be noticed that the petitioner fails to give the source of her information, or the grounds of her belief. In **Grant-Dalton vs Win and Ors** (1923 Wld 180), it was laid down that the Court will not admit statements of belief and information in interlocutory matters unless the grounds of such information and belief are set out and the Court is satisfied that it is necessary to act upon such statements by reason of the grave urgency of the matter or for the purpose of preventing an injury or a threatened illegal invasion of rights".

The applicant's averment in paragraph 12 stands in stark defiance of the principle forming the core of the above statement of the law. That paragraph goes no further than to state the following with regard to the very crucial issue in this application:

"I am informed , and I believe same to true, that the first respondent is about

to remove from the jurisdiction of this Court and will prejudice my claim against him should he so remove. (sic) And the Court grants judgement in my favour. Annexure A".

Clearly the applicant has neither revealed the source of his information nor his reason for believing it to be true. This again the applicant has done at his own peril.

In **Grant-Dalton** above it is stated :

> "The grounds of the deponent's belief must be stated so as to show that he has some reasonable and proper cause for making the statement, and has not sworn merely to raise an issue. The Court of Appeal in England ..... held that an affidavit of information or belief not stating the sources of information or belief, is irregular , and therefore inadmissible as evidence, whether on an interlocutory or final application, and a party or solicitor attempting to use such an affidavit will do so at his peril as to costs".

Mr. Wessels stressed that even if for argument's sake one were to overlook the fact that Annexure "A" to the founding affidavit reflects the date 18-01-2001 as the date of instance it hardly affords the applicant an escape from the Court's censure that he doesn't state when he became aware of the publication relating to the 1st respondent's impending "flight" from the jurisdiction. This is an inexcusable omission for if in fact the correct date is 18-01-2002 then the fact that he waited till 29-01-2002 to move this application on the basis of urgency means that the perceived urgency was self-inflicted. On this aspect of the matter it would be fruitful to have regard to the remarks of this Court in CIV/APN/23/93 **Lesotho University Teachers & Researchers Union vs National University of Lesotho** (unreported) at page 17 where the following expression appears:-

"In the circumstances I would view with favour the submission that urgency was self-inflicted therefore the adverse results of such mischievous act should recoil upon the author's head and not at all be visited on the respondent".

It is my considered view that the applicant's embarkation on this proceeding was an attempt to dissuade the 1st and 2nd respondents from doing what in law is entirely acceptable namely to communicate with their customers matters which

appear to stand on the way of their customers' interests should it appear such customers need to deal and treat with such parties.

Mr. Wessels asked the Court to award costs on attorney and client scale. There doesn't seem to have been any counter by Mr. Sekake to this request. A man was placed in peril of his liberty and threatened with imprisonment on the most obscure of reasons. The source from which the story that aroused the applicant's apprehension has not been disclosed. The document relied on is not an original and all it contains is compounded hearsay. This court wishes therefore to indicate that it cannot allow a man's liberty to be thus imperilled with levity.

The application is dismissed. I am however constrained to award the entire costs as requested for I have a nagging feeling that the applicant may well have not been properly advised on this aspect of the matter. Much as I feel that in a proper case such as the present such costs are deserving I nonetheless feel reluctant to award the costs on wholy the requested scale.

In dismissing the application with costs therefore I would order that only 55% of such costs be on attorney and client scale.

It is so ordered.

M.L. LEHOHLA

JUDGE

5th February, 2002

For Applicant : Mr. Sekake

For 1st & 2nd Respondents : Mr. Wessels S.C.