

CIV/T/32/97
IN THE HIGH COURT OF LESOTHO

In the matter between:

MAMOETI TAETSANE

APPLICANT

And

ITUMELENG LETSEPE & 3 OTHERS

1st RESPONDENT

THE TREASURY DEPARTMENT

2ND RESPONDENT

DEPARTMENT OF NATIONAL

3rd RESPONDENT

SECURITY SERVICES (NSS)

THE ATTORNEY GENERAL

4th RESPONDENT

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. GUNI on the 3rd September, 2002

In 1997 the applicant in this matter sued successfully the 1st respondent herein, for damages for loss of support arising from the death of her husband who had been killed by the 1st respondent. In that action the applicant was awarded damages in the sum of two hundred and seventy-six thousands maloti

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(276,000.00) together with interest at the rate of 18% per annum plus costs of suits.

The applicant is therefore a judgement creditor. The 1st respondent is the judgement debtor. The final judgement in that case had been entered against the 1st respondent on 22nd April 1999. Since that time, all efforts made in an attempt to enforce the said judgment have been unsuccessful. The 1st respondent is described as a policeman serving His Majesty's government in the Department of NATIONAL SECURITY SERVICE. All efforts aimed at locating the property of the 1st respondent for the purpose of executing against it have failed over the years.

The return of service of the writ of execution which was served upon the 1st respondent at his place of work on 5th May 2001, gives me the definite impression that the 1st respondent is a man of straw. Why? It is a NULLA BONA return. (See Annxure 'A' attached to the founding Affidavit).

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Faced with this dilemma of holding a judgement which is not worth the paper it is written on, the applicant once again turned to this court for another relief. This time she seeks a garnishee order in the following terms.

- 1) "Directing the second and third respondents to deduct the amount of M2,000,00 a month from the salary of the first Respondent herein;
- 2) Directing the second and third Respondent to send a cheque for the sum of M2 000.00 every month to applicant's Attorneys office or to hand over to the Registrar of this Honourable Court;

- 3) Directing the Respondents to pay costs herein only in the event that they oppose this application;
- 4) Granting Applicant further and/or alternative relief."

Although all respondents have been served with the notice of this application only the 1st respondent has filed opposing papers. The other three respondents e.g. The Treasury Department, Department of National Security Service and the

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Attorney General have not filed any opposing papers. This is an indication that they have no problems regarding the relief sought in this application. Therefore they must be prepared to abide by any decision or order made by this court.

The 1st respondent in his opposing papers has raised a point of law. He has not dealt with or addressed in anyway the merits of this application. He objects to the garnishment of his salary on the grounds that his salary is the property of His Majesty's government. This is the effect of his objection. He has pleaded it thus:-

"the government or the property of the respondent/Defendant in the hands of the government of Lesotho cannot be garnisheed."

For that objection raised, the 1st respondent has relied on the provisions of Section 5 THE GOVERNMENT Proceedings and contract ACT N0.4 of 1965. It provides :-

No (Execution or attachment or process in the nature thereof shall be issued against the nominal defendant or respondent in arm action or other proceedings against Her Majesty in Her Government..... or against any property of Her Majesty.....

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It is submitted by Mr. Molapo for the 1st respondent that the garnishee order is a form of execution which is contemplated under Section 5 sited above. The salary of the 1st respondent according to Mr. Molapo is the government property. It remains as such until it is released to the 1st respondent or disbursed as he pleases. This sentiment is partly correct. Why? Because before the government has consented to part with its money there is no salary. The money remains the employer's. Once the government has consented to pay the employee his salary, the ownership in the money-making up the salary, passes to employee. The ownership in the property-(salary in our case) passes from the employer to the employee once the employer has consented to pay the employee. LUCAS' TRUSTEE OF BUISSINE (1840) 2 Menz 105 at 108.

It seems to me there is only one issue to resolve in this matter. That is whether or not the 1st respondent salary is His Majesty's government property or not.

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Mr. Phafane for the applicant has argued that the 1st respondent's salary is not His Majesty's government's property. As an employee the 1st respondent has earned his salary. He has

provided his employer with the services in exchange for such salary. What does a word "salary" mean? According to the CONCISE OXFORD dictionary, 8th Edition, salary is a payment to the employee by the employer for services rendered monthly or quarterly.

It is an established practice which has been going on from time immemorial for the various insurance companies to place stop orders against salaries for the payment of insurance policies premiums of certain civil servants. This practice is sufficiently notorious for me to take a judicial Notice of. Why do civil servant permit the insurance companies e.g. Metropolitan, SANLAM, Old Mutual etc. to place stop orders for deductions from their salaries for the payment of the premiums of their policies? Because the salary is the employee's property.

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The indebtedness of His Majesty's Government employees to various organisations, including medical schemes is being reduced monthly by deductions made from their salaries by the TREASURY DEPARTMENT which forwards the money so deducted from the salaries as payment for Insurance premiums or medical schemes instalments. The government cannot be said to be that discriminative by paying insurance policies and medical schemes for some employees who have individually entered into contracts with those companies and leaving out other who have no such contracts. Therefore it cannot be said that the government of LESOTHO pays for the insurance policies of those of its employees from whose salaries the said monthly deductions are made for the payment of premiums. Those civil servant who pay their insurance premiums from their salaries, do so because their salaries are their very own property-not that of His Majesty's government.

Immediately when the salary becomes due and payable, the ownership of the money-making up that salary, vests in the

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employee to whom that money is due and payable. It is at this very point that the employee does whatever he pleases with that money as his or hers for all intends and purposes. JOHN MOLAI RAMOHOLI V PRINCIPAL SECRETARY FOR EDUCATION and others CIV/APN/105/95. In this case the Principal Secretary for Education had suspended John Molai Ramoholi without pay. Ramoholi was suspected of misconduct. He was suspended without pay even before he was given an opportunity to be heard on that allegation of misconduct. This case was decided upon the principle (audi alteram partem) which was applied and upheld. The Honourable Mr. Justice MAQUTU also held that taking a person's emoluments (salary) (even temporarily) is alio taking away his property and existing rights (my underling).

This case confirms without a doubt that a man's/woman's salary is his/her property.

Over a very long period of years, at least three¹ years, the applicant has tried in vain to enforce her rights. This

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respondent has not attempted to assist in anyway for the enforcement of this judgement. The only hope entertained by the applicant herein, is that the court of law will assist her to get satisfaction of the judgement she obtained against the 1st respondent. After struggling for so many years without success, to locate the property of the judgement debtor the applicant seeks the garnishee order against the judgement debtor's salary as a very last resort. Does the statute (Section 5 Government Proceedings and contracts Act 4 of 1965) prohibits execution against such property? The answer must be in the negative. The employee's salary does not form part of the government's property.

In terms of Section 2 of THE CONSTITUTION of LESOTHO, the constitution is the Supreme law of the land and if any other law is inconsistent with this constitution, that other law shall, to the extent of that inconsistency be void.

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There are constitutional provisions, which have guaranteed certain fundamental human rights. For example section 19 has guaranteed every person equality before the law and equal protection of the law. Section 5 of the Government Proceedings and Contracts Act N0.4 of 1965 if applied, would have blatantly discriminated against one of the persons by giving protection as claimed to this respondent. This Act is not intended to apply in circumstances of this nature.

Has this respondent properly sought refuge under the provision of this Act 4 of 1965 (supra)? This Act was not intended to protect individual civil servants. Immediately it does offer the certain individuals that protection, it will be inconsistent with section 18 and 19 of the Supreme law and therefore to that extent void. The Government Proceedings and contracts Act N0.4) 1965 is meant to protect the Government -not individual public servants. It offers no sanctuary for the

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respondent. In terms of section 18 (2) "no person shall be treated in a discriminatory manner by any person acting by virtue of any written law .

That statute - (Section 5 government proceedings and contract Act) offers protection to one of the litigants unfairly for no reason at all. Section 18 (3) describes discrimination as according privileges and advantages to one party while subjecting the other party to restrictions and disabilities. This section 5 Government Proceedings and contracts Act N0.4 of 1965 subjects this applicant to unwarranted disabilities and restrictions to enforce her lawful judgement. That section could not have been intended to apply between individuals. The respondent's salary is his and not that of His Majesty's government.

In these circumstances the application must succeed. It is granted as prayed with costs. The treasury is ordered to deduct the two thousands maloti per month from the 1st respondent's

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salary and forward the cheque for that amount to the registrar of this court for onwards transmission to the attorneys of the applicant.

J.K. GUNI

JUDGE

For applicant - Mr. S. Phafane
For respondent - Mr. Molapo