IN THE APPEAL COURT OF LESOTHO

HELD AT MASERU **C OF A (CIV)N0.32/2012**
CIV/APN/395[B]/2012

In the Matter Between:

O/C MILITARY POLICE	**1ST APPELLANT**
COMMANDER LDF	**2ND APPELLANT**
COMMISSIONER OF POLICE	**3RD APPELLANT**
MINISTER OF POLICE	**4TH APPELLANT**
MINISTER OF HOME AFFAIRS	**5TH APPELLANT**
ATTORNEY GENERAL	**6TH APPELLANT**

AND

EYOB BELAY ASEMIE **RESPONDENT**

CORAM: RAMODIBEDI P
HOWIE JA
HURT JA

HEARD: 11 OCTOBER 2012
DELIVERED: 19 OCTOBER 2012

SUMMARY:

Refugee Act 18 of 1983 - naturalization of refugee under section 14 - total residence-period prior to application for naturalization six years - application prior to expiry of six year period ineffective.

JUDGMENT

HURT JA

[1] A refugee who flees to Lesotho is to be dealt with under the provisions of the Refugee Act, 18 of 1983 ("the Act"). Such a person may apply for citizenship by naturalization, in terms of section 14 of the Act, if he satisfies the Minister of Home Affairs that he meets the requirements prescribed in the Schedule to the Act. The Schedule reads as follows: –

"***Qualifications for Naturalization***

1. Subject to paragraph 2 of the Schedule, the qualifications for naturalization of a refugee who applies are that:

(a) he has resided in Lesotho throughout the period of twelve months immediately preceding the period of the application;

(b) immediately preceding that same period of twelve months he has resided in Lesotho for periods amounting in the aggregate to not less than five years;

(c) he has an adequate knowledge of Sesotho or English;

(d) he is of good character;

(e) he would be a suitable citizen of Lesotho; and

(f) he intends, if naturalized, to continue to reside permanently in Lesotho."

[2] The respondent was the applicant in the High Court (I will continue, in this judgment, to refer to him as "the respondent"). His application was brought as a matter of urgency, seeking a wide spectrum of relief ranging from interdictory through declaratory to mandatory. On 15 August 2012 he was granted a rule *nisi* by Mahase J, returnable on 23rd of August 2012. The interdictory and mandatory relief was mainly meant to protect the respondent from alleged persecution, intimidation and threats to which, he said, he was being subjected by various officials in the government. Most of the relief which he sought was removed from the arena of the application by compromise or abandonment, and in this appeal only three orders (apart from the question of costs) remain as bones of contention.

[4] The first is an extraordinary order which was sought on the basis that part of the harassment to which the respondent was subjected was occasioned by regular investigation procedures coupled with threats of prosecution without any formal charges being brought against him. The prayer called upon the Commissioner of Police (third respondent in the application) to show cause why: –

> "*6. 3rd respondent and/or officers subordinate to him shall not be directed and ordered to prefer the purported criminal charges, if any, against the Applicant, within seven (7) days from the date of service of this Order upon the legal section /office of the 3rd Respondent, failing which and on the lapse of which time, no criminal charges shall ever be brought against the applicant on the basis of his conduct preceding the date of this Court Order, and at which time this particular order shall ipso facto become final.*"

This prayer was one of the many in the Notice of Motion in respect of which interim relief was granted. It amounts, of course, to a blanket indemnity from prosecution for any conceivable offence pre-dating 15th August 2012. Notwithstanding that the return date of the rule was 23rd August, counsel for the respondent appeared *ex parte* before Mahase J on 22nd August and, presumably in response to his assertion that the

seven day period had expired, he was granted a final order in the following form:

"1. No criminal charge shall ever be preferred by 3rd Respondent and/or officers subordinate to him against Applicant on the basis of Applicant's conduct preceding the order of the 15th August 2012."

I only need to say that, in my career of more than forty years in the law, I have never seen a procedural step which, on its own, bristles with as many irregularities as the grant of this *ex parte* order. Mr Mdhluli, who appeared with Mr Maqakachane for the respondent, readily and properly acknowledged that the order was insupportable and I will say no more about it.

[5] The remaining two substantive orders granted by Mahase J on the extended return day and after argument were as follow:

" 1. The Applicant is hereby declared a naturalised citizen of Lesotho.

2. The 5th Respondent [the Minister of Home Affairs] is hereby ordered and directed to swear-in or cause to be sworn in, the Applicant as a naturalised citizen of the Kingdom of Lesotho ***within Fourteen (14) days*** *of this order."*

[6] It is not disputed that the swearing-in ceremony only takes place once a certificate of naturalization has been approved and issued by the Minister and as a precursor to the formal handing of the certificate to the recipient. Apart from the express provisions of the Lesotho Citizenship Order 1971 to this effect, there would be no point in swearing someone in as a citizen before he had become entitled to a certificate. The respondent's case was that he was entitled to be issued with a naturalization certificate, which was being wrongfully withheld from him by the Department of Home Affairs. He said that he had been invited to previous swearing-in ceremonies but unlawfully precluded from taking the oath of allegiance to the Kingdom. The mandatory order to swear him in was accordingly aimed at avoiding a repetition of this occurrence. But, as far as this appeal is concerned, I do not have to deal with the propriety of the mandatory order if it transpires that the relief in declaratory form cannot stand scrutiny. And I do not think it can.

[7] The order declaring the respondent to be a naturalized citizen must obviously have been founded on the respondent having established a right to be granted that status. The respondent's assertions in this regard in the founding affidavit were challenged in the answering affidavits of the Home Affairs officials concerned, generating a fairly extensive factual dispute. But it seems to me that the issue of the existence or otherwise of the respondent's right to a certificate of naturalization can safely and conclusively be resolved on a very narrow issue, namely the period of his residence in Lesotho prior to his making the application for citizenship.

[8] The respondent's evidence about his arrival in Lesotho was as follows:

"4.3 I then came into Lesotho upon which around 2003 I sought political asylum. I immediately met the then Commissioner for Refugees Mr Francis T. Sefali and sought refugee status. Mr Sefali sought certain documents from me which I had left in Ethiopia. In the meantime, he wrote a "to whom it may concern" letter introducing me as a person seeking asylum in Lesotho. At that time I stayed at Lower Thetsane while I facilitated the necessary documents from Ethiopia.

4.4 It was only in 2005 when I was able to get the documents and I presented them to Mr Sefali again on the 26th September 2005."

[9] The respondent's evidence was challenged on a number of aspects, but particularly on his allegations as to the date on which his sojourn in Lesotho had commenced. As pointed out in the answering affidavits, all the documents before the court seemed to indicate that the respondent himself had initially made out a case that he had started living in Lesotho in 2005. The respondent's riposte to these challenges was that the documents to which reference was made had been tampered with or forged and that various other crucial documents which would have supported his case had unlawfully been withheld from him. These are serious allegations indeed. But the respondent made no effort, apparently, to avail himself of the procedures of discovery and cross examination which a reference of the dispute to trial would have placed at his disposal. Nor, according to the record at least, did he even ask for *viva voce* evidence on this crucial aspect of the dispute.

[10] In my view, this dispute could have been resolved by a careful consideration of the papers in the application, more particularly the following:

(i) A letter dated 26 July, 2005, from a concern called "Solomon General Importer", trading in Addis Ababa, requesting a visa for the respondent, their purchasing manager, to enable him to travel to Lesotho.

(ii) An official application form for refugee status completed by the respondent and containing an entry to the effect that he arrived in Lesotho on "Aug 18 2005".

(iii) The respondent's own version of what occurred between the time he came to the country and the date of his application for refugee status.

<u>The Request for a Visa</u>

[11] This letter is under the letterhead of "Solomon General Importer". It refers to a proposed business venture involving the export of coffee from Ethiopia to Lesotho and the reciprocal export of mineral

water from Lesotho to Ethiopia. It ends with the sentence:

"Therefore kindly we request a visa for our Purchasing Manager, Eyob Belay Asemie, and Sales Manager Fikadu Rassom Haile to enable them to check the quality of the product by going to Lesotho as we reached in agreement with the exporting company in Lesotho to introduce the white gold of Lesotho to Ethiopia."

The respondent dismisses this document as a part of the "far-fetched and cunning story" devised by the Principal Secretary of the Department of Home Affairs. But it is difficult, from the appearance of the document, to think that it could have been specially forged in order to concoct a false case against the respondent. It is couched in cordial business language and while it does not reflect a registration number of the firm "Solomon General Importer", that omission hardly counts in favour of the respondent's allegation. Its significance, according to the averments in the affidavit of the Principal Secretary for Home Affairs, is that a person would not be accepted as a refugee if he is employed and travelling to Lesotho for business reasons. Moreover the letter must not be considered in splendid

isolation, but in its context in the evidence and with the other document to which I will now refer.

The Application for Refugee Status

[12] This document was put up as an annexure to the answering affidavit of the Principal Secretary. It is four pages long and crammed with data about the life history of the person who compiled it. The Principal Secretary, who annexed the document to his answering affidavit, pointed out that, in it, the respondent stated that he had come into Lesotho "on Aug 18 2005"."This", replies the respondent, “is yet another official forgery - the date has been altered".

[13] I must immediately acknowledge that there is something strange about the manner in which the year "2005" is written at this point in the document. It is therefore unsafe to regard this entry as one counting against the respondent. But there are other entries, clearly made by the respondent, which provide safer ground for concluding that he did, indeed, come into Lesotho for the first time in 2005.

I quote the following questions and answers from the document:

"**Q** *Have you ever been arrested, detained, restricted or ordered to report periodically by your country's police?*

A *Yes.*

Q (If yes) Please give details to your answer.

A *(i) On May 2/2005 they imprisoned (sic) me for 2 days.*

(ii) On May 11/2005 after the great political (sic) strike of May 8 above 4 million people were supporting our party in Addis Ababa and it was transmitted and got media coverage of BBC and CNN during that time."

It is not quite clear what the respondent was trying to convey in the second of these entries, but what *is* clear is that he was somehow involved in the strike to which he refers. What is altogether beyond doubt is that the first entry contains an acknowledgement by him that he was still in Addis Ababa in May 2005.

The Respondent's Evidence in the Founding Affidavit.

[14] I have set out verbatim in para 8 what the respondent said about the circumstances of his arrival in Lesotho. This evidence is disputed by the Principal Secretary and Mr Lerotholi, the Commissioner for Refugees. Apart from pointing to the documents already dealt with, and emphasizing that the so-called "to whom it may concern letter" has not been annexed to the founding affidavit, they say that the account of the conduct attributed to Mr Sefali is highly improbable.

[15] This submission is, I think, borne out by the terms of the Act. Section 7 contains the following procedural provisions:-

"(1) A person who has lawfully entered or is lawfully present in Lesotho and who wishes to remain in the country on the grounds that he is a refugee within the meaning of Section 3(1)(a) or (b) shall, as soon as practicable, make an application in the prescribed form to the nearest authorised officer for recognition of his status.

(2) The authorised officer to whom the applicant applies shall forward such application to the Committee.[1]

(3) The Committee shall invite the applicant to appear before it, consider the application and make recommendations thereon to the Minister."

[1] The Inter Ministerial Committee constituted in terms of the provisions of section 5 of the Act

[16] There can be little doubt that the procedure contemplated in the Act was intended to create a swift and efficient way of catering for refugee immigrants and at the same time preserving the security of the Kingdom. Judged in this light, the gross improbability of Mr Sefali having done what the respondent alleges is made manifest. Not only would he have ignored the prescripts of the Act by failing to convene the Committee meeting at which the respondent would be appropriately vetted, but he would have handed to the respondent a document which was a potential instrument of his (Sefali's) destruction, because if any official had seen it and identified its source, there would have been serious consequences for him. Viewed objectively, it is not surprising that the respondent was not able to annex this curious letter to his affidavit. It seems to me, even judging the matter on the affidavits, that such a letter is unlikely ever to have existed.

[17] On the other hand, the conduct of Mr Sefali which the respondent describes from about 26th September 2005 onward, is precisely that prescribed by the Act. This again favours the conclusion that Mr Sefali

only encountered the respondent for the first time in 2005 and not in 2003.

[18] The above aspects are not the only ones which tend to sway the probabilities toward the appellants' version, but it is not necessary to go further than them for the purpose of this judgment. From what is set out in paras 10 to 17, one can confidently and, I think, quite safely come to the conclusion that the respondent only arrived in Lesotho shortly before September 2005.This conclusion disposes of the respondent's claim to be entitled to a certificate of naturalization. On his own account he made his application on 5th January 2009, less than four years after he had taken up residence in the country. His application was plainly premature, and the circumstance that it was considered was primarily attributable to the untrue statement as to the commencement date of his residence in Lesotho.

[19] The reason why the Home Affairs officials may have given the respondent to understand that his application for a certificate would be successful is explained by the fact that they thought he was genuine and *bona fide*. It was only when they

started to suspect that he had not been candid in furnishing them with information that their attitude changed. As appears from para 26 of her judgment, this change of attitude was regarded as a significant and sinister by Mahase J. But that, I have no doubt, is because she clearly approached the analysis of the evidence on the basis of a preconceived presumption that everything the respondent had told the court was true. This is a cardinal error in adjudication in any judicial function. An objective assessment might, I think, have lifted the scales from her eyes.

[20] The result is that I consider that Mahase J erred in her assessment of the evidence and the orders which she granted must be set aside. There is no reason why the order for costs should not follow the result in both courts. Accordingly I make the following order:

1. The appeal is upheld with costs.

2. The orders in the court *a quo* are set aside and the following order substituted:

"The application is dismissed and the applicant is ordered to pay the respondents' costs."

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N. V. HURT
JUSTICE OF APPEAL

I agree:

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M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

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C.T. HOWIE
JUSTICE OF APPEAL

For Appellants : Adv R. Motsieloa
For Respondent : Adv. S.Mdhluli
with Adv. S.T. Maqakachane