IN THE HIGH COURT OF LESOTHO

In the matter between:

PAKALITHA MOSISILI	1ST APPLICANT
SHAKHANE MOKHEHLE	2ND APPLICANT
NOTSI MOLOPO	3RD APPLICANT
SEPHIRI MOTANYANE	4TH APPLICANT

AND

CANDI RATABANE RAMAINOANE	RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 9th day of January, 1998

This application was brought on a certificate of urgency on the 12th February, 1997. On the 21st October, 1997, argument began before me, but Counsel were obliged to ask for an opportunity to prepare further in order to be able to do justice to the case before me. I had to postpone the matter to the 16th December, 1997.

The application that had been brought *ex parte* was phrased in the following way:-

1. That a *rule nisi* be issued against respondents returnable on a date and time to be determined by this Honourable Court, calling upon the respondent to show cause, if any, why:

   (a) The respondent shall not be sent to gaol for imprisonment for contempt of this Honourable Court in relation to CIV/APN/368/96.

   (b) Dispensing with Rules of this Court regarding forms, service and filing of process on account of urgency.

   (c) Costs of suit.

   (d) Further and/or alternative relief.

And that the founding affidavit of PAKALITHA MOSISILI annexed hereto was to be used in support thereof.

Uncertainty and probable obsolescence of our law in respect to our Constitution.

Lesotho has not yet matched our law with "freedom of expression" as stated in our Constitution. We have largely based our law on Roman Dutch law of defamation as received from the Cape of Good Hope and modified by English

law of slander and libel. This problem becomes particularly acute when one considers that the idea of a Bill of Rights for the protection of fundamental human rights and freedoms which is in our Constitution is largely an innovation copied from the United States of America. Our courts still have to really say what our law as modified by the Constitution really is. What makes matters worse is that our media law is confused with the media law of the United States of America .

Burchell in *The Law of Defamation in South Africa* page 190 dealing with the USA, said about the case of *Gertz v Robert Welsh Incorporated* 418 US 323 (1974):

> "The connotation given to "fault" was that public figures and officials must prove publication of defamatory falsehood 'with knowledge that it was false or with reckless disregard of whether it was false or not' to recover in defamation suits'....The reason for this distinction between public figures and private individuals is that public figures usually have more effective opportunities to rebut the defamatory imputation than private individuals."

This statement of USA law had already been brought to the attetnion of Hill AJ through the case of *New York Corporation v J.B. Sullivan* 376 US 254 in the case of *Pelzer v SA Associated Newspapers & Another* 1975(1) SA 34 at page 41. Hill AJ rejected it for South Africa because it dealt with the effect of constiuttional enactments. Consequently in South Africa "a defamatory statement made about another without lawful justification is presumed to be done maliciously". This distinction between the law of the USA and the law in

the region before the recent constitutional enactments in Lesotho and South Africa is often overlooked.

In the United States of America, the First Amendment of their Constitution has been interpreted as guaranteeing the free flow of ideas and opinions on matters of public policy. American law treats private persons differently from public officials and politicians. The private individual can easily resort to defamation proceedings while a similar remark directed at a politician or an official might not be treated as unlawful defamation. The American First Amendment was interpreted liberally in favour of the citizen because it is considered that there is great benefit in exposing corruption and wrongdoing. There is fear in the United States of America that if courts were to adopt a different attitude there would be suppression and truth and information.

While it is important to protect reputations, there is a lot of uneasiness about what many people feel is the misuse governments and ministers that is put to confidentiality which is an important social end. They often cover up misrule and create a shroud around activities of government that prevents open government. In *Johnny Wa Ka Maseko v Attorney General and Another* 1993-1994 *Lesotho Law Reports and Legal Bulletin* 207 at 229 I see the remarks of Ackermann JA as heavily influenced by the USA law of defamation where he puts an onus on the Commissioner of Police in a case of defamation

that was associated with the security of the State by calling upon the Commissioner to place before the court sufficient material;

> "to establish that second respondent had reasonable grounds for suspecting that the allegations were deliberately or recklessly false."

The *Johnny WA Ka Maseko* case had a criminal element which naturally places the onus on the Commissioner of Police, but even so, what was largely at issue was the law of defamation. The USA law in respect of public officials and Ministers puts the onus in such a case on the defendants. It is by no means certain that Lesotho will or has actually moved towards the USA position. Nevertheless Ackermann JA encouraged the press to publish confidential information which has been leaked to the press in order to expose corruption as a necessary risk, taken in the public interest.

I have already noted the enormous influence of the Law of the USA has on our public perceptions of unlawful defamation. As already stated, our common law probably lags behind the law of the USA in this field. In *Die Spoorbond v SAR* 1946 AD 990 Shreiner JA held Government cannot sue for defamation. The logical consequence of the Westminister Parliamentary democracy that we inherited from Britain ought to be that associating a particular Minister with that policy ought not to be unlawful defamation because of the political responsibility of such a minister with that policy. The same should also be true of Cabinet Ministers unless false or fictitious policies

are imputed to them. Van Zijl JP in *Minister of Justice v SA Associated Newspapers Ltd.* 1979(3) 466 at 475 encouraged every person to criticise persons concerned directly in the government of the country;

> "...as long as he does not impute to them improper motives and dishonourable conduct, his words are not defamatory, however unfair or unfounded his criticism or condemnation may be."

The problem we have is of what is meant by wicked, improper motives and defamation. Burchell in *The Law of defamation in South Africa* at page 220 says fair comment does not remove the defamatory content of the words used:-

> "The better view, however, seems to be that the words remain defamatory in nature, but their publication is lawful or justified, in terms of social, legal policy."

The meaning of the words "improper motives" or wickedness is very often subjective and may differ from time to time and from context to context.

According to Burchell in the *Law of Defamation in South Africa* page 190 in the USA public figures and officials have the onus to prove that publication of defamatory falsehood was embarked upon with knowledge that it was false or reckless disregard of whether it was false or not. In Southern Africa, the onus remains on the plaintiff whether a private individual or a public official or minister is involved. Even so, for Lesotho, this question has not been decided in a proper case where "freedom of expression" in a democratic State in terms of Section 14 of the Constitution was addressed. The Court of Appeal

judgment in *Johnny WA Ka Maseko v Attorney General & Another* is merely pointing in the direction of the USA.

In the case before me, it might well be that respondent is not aware that even in the USA publication of defamatory matter against a public official can never be made recklessly as to truthfulness of its contents. If there was a *bona fide* belief that it is true, then the publication cannot be deemed unlawful defamation in the USA. I am not sure respondent in the case before me, exercised sufficient caution.

Nature of the law of defamation on which the application is based

Proceedings of which this court is seized began as an application restraining respondent from publishing false defamatory matter about applicants. Now applicants have brought proceedings against respondent for contempt of court for publishing defamatory matter about applicants. Our private law is based on Roman Dutch law as received from the Cape of Good Hope up to 1884. Consequently our law is not identical to English law on the subject. Mc Kerron *The Law of Delict* 7th Edition at page 186 succinctly states our law as follows:

> "In English law truth itself is a good defence, but it is settled law in South Africa that truth without an element of public benefit although it may be pleaded in mitigation of damages is not a complete defence.

It follows therefore that publication of what is true without the redeeming

feature of public benefit is contrary to our common law. Indeed it would seem freedom of speech which is a fundamental right in our Constitution is protected precisely because of the benefit society derives from it.

Galgut JA in his forward to the Second Edition of *The Newspaperman's Guide to the Law* page VII said of freedom of speech:-

> "It is a freedom belonging to each citizen. This becomes apparent when one realises the function and duties of the press. It is the task of the journalist to gather news and present it to the public. Every member of the public expects, and is in fact entitled, to be informed about events and happenings surrounding him so as to enable him to understand the problems facing society in general and the individual in particular."

In *Holomisa v Argus Newspapers Ltd.* 1996(2) SA 588 at page 610 Cameron J put the role of the press in perspective when he said:-

> "It does not follow, however from ... recognition of the importance of the media ... that journalists enjoy special immunity beyond that accorded ordinary citizens."

In that case Cameron J was discussing the special role of the press in the South African Constitution. In Lesotho this right is simply put as "freedom of expression" in Section 14 of the *Constitution* and this right is subject to the duty to respect "The reputations, rights and freedoms of other persons or private lives of persons concerned,"—see Section 14(2)(b) of the *Constitution.* In Lesotho the freedom of speech that the press enjoys is the freedom that an individual enjoys.

I was very critical about the style of journalism of respondent. I observed that conclusions are made without an adequate factual background. This in my view violates Section 14(4) of the *Constitution* which provides:-

> "Any person who feels aggrieved by statements or ideas disseminated to the public by a medium of communication has the right to reply or require correction to be made using the same medium under such conditions as the law may establish."

It seems to me that sufficient facts should be provided before conclusions can be drawn to enable the person on the receiving end of the criticism to be able to reply. That is only fair. I found respondent type of journalism not inclined to inform but rather to assail other people mercilessly without caring whether he attacks their dignity unfairly in the process.

In *Pelser v SA Associated Newspapers Ltd. &Another* 1975(1) SA 34 the court felt there should be full and free discussion of matters of public interest but that improper motives should not be imputed to those in high places unfairly because this exhibits an *animus injuriandi* which goes beyond whatever public benefit that the publisher had in mind. In that case the press had taken the Minister of Justice to task for reprieving a white man sentenced to death and not doing so in respect of a black one. The Minister and the system were accused of racism. In the United States of America the Minister would not have had a right of action. In South Africa it was held that the Minister had been defamed. Today I am not sure South African Courts would

be of the same view. That is why I am sceptical of *Hertzog v Ward* 1912 AD 62 to which I was referred on the question of imputing improper motives to Ministers. Fair comment becomes obscured by State ideology and the morality of the day. The society that believed in apartheid (of which judges were a part) was probably not conscious of the fact that the apartheid policy was institutional racism and the racial discrimination which was at the root of proceedings in *Pelser v S.A. Associated Newspapers Ltd.* was inevitable. Nevertheless I am not sure if respondent in the case before me should feel problems courts have about what should be deemed to be "unlawful defamation" entitles him to be so emotional, reckless and unrestrained in the attack of characters when he deals with the Ministers and politicians. Even in the USA recklessness and absence of belief in truthfulness would render respondent liable.

The problem I have with the common law of defamation which we share with the Republic of South Africa is that it should be interpreted in line with the Lesotho *Constitution*.

The *Constitution* is the supreme law of the land. The supremacy of the *Constitution* over the legislature is copied from the U.S.A. Consequently there is no place in Lesotho for the English doctrine of "supremacy of Parliament" because even Parliament is subordinate to the *Constitution*. In *Ndlwana v Hofmeyr* 1937 AD 229 the courts lost sight of the fact that the *South Africa Act*

1910 was a constitutional statute, consequently Parliament could not be supreme over it. The courts therefore erred when they allowed Africans to be removed from the common voters roll without following the procedure laid down in it. In *Harris v Minister of Interior* 1952(2) SA 428 the courts corrected their mistake and held Parliament was subordinate to the Constitution and struck down as unconstitutional Parliamentary efforts to remove coloureds from the common voters roll. Our reference point in constitutional interpretation of the law of defamation cannot be the English Common law of interpretation of statutes because English Constitutional law is rooted in the doctrine of "supremacy of parliament". Defamation falls under the constitutional right of "freedom of expression".

There was moral blindness in the past where actions of Parliament were viewed under the doctrine of "supremacy of parliament". Consequently the motives of Parliament could not in the past be questioned in matters of legislation. This was exposed in the case of *Collins v Minister of Interior* 1957(1) SA 552 where a ruling party that had failed to get the required two thirds majority to change the Constitution, reconstituted the Senate, increased its membership and packed it with its supporters. All this was done in order to remove the coloureds from the common voters roll. When this action was challenged, the majority of the court held that motives of parliament cannot be challenged. When the press attacked Ministers and Members of Parliament for packing the Senate and imputed all sorts of motives to them, the court in

Pienaar v Argus Printing & Publishing Co. Ltd. 1956(4) SA 310 found them liable for unlawful defamation for imputing improper motives to Ministers and Members of Parliament. In countries where the Constitution is supreme law, such moral blindness and lack of equality of treatment in matters which have a constitutional bearing would be out of place, because both Government, Parliament and the citizen are subject to the constitution.

It remains true that approaches of courts cannot always be the same from one era to another. In *Pienaar & Another v Argus Printing and Publishing Co. Ltd.* 1956(4) SA 310 the court awarded damages that were very low where what was at issue was the packing of the Senate with Nationalist Party supporters. Here too the issue was the imputing of improper motives to people in high places. Ludorf J at page 318 said:

> "...courts must not avoid the reality that in South Africa matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers are aware of this...allowance must be made in the present case, because the subject is a political one, which had aroused strong emotions and bitterness, whereof the reader was aware and he would not be carried by the violence of language alone."

Ludorf J noted what Gatley on *Libel and Slander* 3rd Edition page 468 said to the effect that:-

> "In cases of comment on a matter of public interest the limits of comment are very wide indeed. This is especially so in the case of public men. Those who fill public positions must not be too thin-skinned in reference to comments made upon them."

There was some inconsistency in the way imputing improper motives was viewed in South Africa in those days. When ministers and politicians reconstituted the Senate and packed it with supporters of the apartheid policy in order to change the South African *Constitution* the Appellate Division in *Collins v Minister of Interior* held its motives were irrelevant. It was clear that the intention of the Government and Parliament was to remove Coloureds from the Common voters roll with the *Validation of Separate Voters Act* 1951. It seems odd (in respect of Senate) that courts could treat as irrelevant and turn a blind eye to improper motive of Ministers and Parliament to subvert the existing constitution in *Collins v Minister of Interior* but keep their eyes open where improper motives are imputed by the public to the activities of those Ministers and members of Parliament in respect of the same Senate as they did in *Pienaar & Another v Argus Printing Publishing Co. Ltd.*

The supremacy of the constitution over Parliament, Government and the Courts was still imperfectly understood, the doctrine of supremacy of Parliament British style was still firmly entrenched. South African courts had applied the doctrine of the supremacy of the constitution in *Harris v Minister of Interior* 1952(2) SA 428 but were still steeped in the British culture of interpretation of statutes. The interpretation of the Constitution and its supremacy over other organs is based on the written constitutional culture of the United States of America. If the Constitution is supreme, then American

courts are obliged to balance the powers of the individual and Ministers who control the State machine with its awesome powers. It follows (according to that reasoning) that Ministers should not be allowed to discourage publication of information, by putting an onus on the citizen, even though the Ministers might know that the citizen is telling the truth but he cannot disclose his sources. If we subscribe to the supremacy of the written constitution we cannot ignore the jurisprudence of the USA constitutional interpretation.

What has always been a problem is that courts in the past used to use words in their judgments that emphasise the right to vigorously criticise government, but in practice discouraged it. In *Minister of Justice v SA Associated Newspapers Ltd.* 1979(3) SA 466 South African courts were still of the view that a citizen can criticise ministers as much as he sees fit even unfairly but he must not impute to them improper motives or dishonourable conduct. While he kept within those limits his words would not be regarded as defamatory in the unlawful sense.

In our day it is not certain whether imputing improper motives to any person, high or low would be licensed under the "freedom of expression" provision of the Lesotho *Constitution.* It is difficult to divide fair comment from imputing improper motives. It remains certain that motives of any person are slippery and uncertain. It is very easy to misjudge, whether what has been imputed is defamatory, in an unlawful sense. Burchell in *The Law of*

Defamation in South Africa at page 30 has correctly observed, there is always tension between protection of reputations and freedom of expression. Courts therefore ought to proceed with caution in this delicate area.

The task of the press or of any person who reveals defamatory information is always very difficult, he does not always escape liability for defamation. Whatever the position the courts in Lesotho take, this area of the law will always be full of risks. The objective and the subjective factors are sometimes inseparable in judging what is for the public benefit. Those who speak ill of others whether they believe what they say is true or for the public benefit or not run the risk of being liable for unlawful defamation. It is a risk that public spirited people take and for which they sometimes pay dearly if it should be determined that what they said is false and not for the public benefit. I believe respondent is reckless and sometimes irresponsible in what he writes. Consequently respondent had better be careful.

Preventing criticism "gagging writs"

It seems to me that once "unlawful defamatory" matter has been published, there is often no point in seeking an interdict because the damage has already been done. It certainly is wrong to close the mouths of critics merely because they have once erred.

The problem with the interdict which I am now enforcing through

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contempt of court proceedings is that it has tendencies of what in England is called a "gagging writ". This happens when legal proceedings are issued for a claim of damages and such proceedings have an effect of stifling comment. Sometimes such proceedings are brought with the intention of stopping press criticism. Salmon LJ in *Thomson v Times Newspaper Ltd.* [1969]3 All ER 648 at 651 put "gagging writ" in the following terms:-

> "It is a widely held falacy that the issue of a writ automatically stifles further comment. There is no authority that I know of to support the view that further comment would amount to contempt of court. Once a newspaper has justified, and there is *prima facie* support for justification, the plaintiff cannot obtain an interlocutory injunction to restrain the defendant from repeating the matter complained of..."

Lord Denning MR supported Salmon LJ in *Wellersterner v Muir* [1974]3 All ER 219 at page 230:

> "I know that it is commonly supposed that once a writ is issued, it puts a stop to discussion... I venture to suggest that it is a complete misconception. The sooner it is corrected the better. If it is a matter of public interest it can be discussed at large without fear of thereby being found in contempt of court."

In Lesotho counsel once inadvertently abused interdict proceedings to muzzle a particular newspaper from criticising a particular politician during an election campaign. This court was critical of such conduct when the case came to be finalised several months after elections had been held. See *E.R. Sekhonyana v Mamello Morrison & Another,* CIV/APN/50/1993 (unreported).

A misconception existed in this case about the nature and purpose of their interdict. Unlawful defamation is actionable. Not all defamation is actionable. It all depends on circumstances. In the case before me the interim order restrained defamation based on false allegations. It does not mean just because respondent published what was false about applicants, whatever he publishes in future will automatically be held to be false merely because applicants say it is false. That would be to stop all criticism emanating from respondent and directed at applicants.

Absence of focus in this interdict application

If the style of journalism of applicant was in issue and the order sought to restrain it, it would be understandable. I had no previous issues of the newspaper to compare with. All this information was left out of the papers before me. I could not determine what Kheola CJ had been dealing with, consequently I could not say whether respondent had repeated what this court had forbidden him from doing. Unfortunately counsel for applicants they chose to interpret the Court Order too widely. Where there is ambiguity *Voet 47·10·20* says "a presumption is not to be made in favour of wrongdoing". Contempt of court consists of intentionally disobeying a court order. Where its interpretation is not easy, it is not easy to convict of contempt of court.

This application was served and the parties first appeared before Guni J on the 14th February, 1997 and by that date respondents answering affidavit

had been filed. Applicants never filed a replying affidavit. By the 3rd March, 1997 the matter was being postponed in order to enable the parties to obtain a date of hearing.

I was a bit puzzled to find that this file was voluminous and of the third volume I was expected to hear, I was confined to pages 104 to 156. The other two volumes of this case and the rest of Volume III of the file before me, I was told, had nothing to do with the case before me. In the section of the file I was supposed to hear the judgment of Lehohla J that I was supposed to enforce was not included. Fortunately that judgment was on my table and I could refer to it.

Lehohla J's judgment in CIV/APN/368/96 dealt with the point *in limine* of the right of the Attorney General to represent Ministers of the Crown in actions of defamation. It also dealt with joinder of parties such as the publisher and proprietor. Indeed the whole procedure of bringing proceedings involving defamation by way of *ex parte* proceedings was being questioned. Lehohla J dismissed most of the points *in limine* except the issue of non-joinder and postponed the application *sine die* ordering the joinder of other interested parties. While the matter was postponed the *rule nisi* issued by the Chief Justice was to remain in operation.

The *rule nisi* issued by the Chief Justice appears in Lehohla J's judgment

and it reads:-

> "(a) Respondent shall not be restrained and/or interdicted forthwith from printing or causing to be printed, published and distributing or causing to be distributed articles in "MOAFRIKA" newspaper which falsely and maliciously defame applicants and impair their reputation, integrity, fair name and fame until the finalisation of CIV/T/419/96 and CIV/T/439/96.
>
> (b) Dispensing with Rules regarding service and filing of process due to the urgency of the matter.
>
> (c) Respondent shall not be ordered to pay costs of this application.
>
> (d) (*sic*) Order 1(a) operates with immediate effect.
>
> (e) (*sic*) Further or alternative relief.

I wish to state at the outset that the interim interdict pending the finalisation of this application is not clearly spelt out. The matter still had to be argued and clarified. I also wish to draw attention to the fact that this order and its meaning is not easy to determine. In contempt of court proceedings, the court order must be so clear that failure to comply with it can only be wilful. There should be no excuses in failing to comply with the court order. It must be clear that the respondent intentionally and deliberately did what the court had ordered him not to do. See Herbstein & Van Winsen *The Civil Practice of the Superior Courts in South Africa* 4th Edition at page 826 where it is said:

> "The court will only commit a person for contempt of court only when his disobedience of the order is due to wilfulness...a person's disobedience must not only be wilful but also *mala fide*."

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The court exercises awesome powers especially where liberty of the subject is concerned, therefore, it will not lightly assume it has been shown disrespect or insulted. I have to scrutinize the order of the court before I send respondent to prison.

It is particularly so when faced with politicians and elected officials that the law of defamation becomes a bit complex. The reason is that they have to be publicly criticised and whatever renders them unfit for public office disclosed. The four applicants are politicians and Ministers of the Crown. Their actions are always subject to public scrutiny and they must expect and accept criticism.

In *Argus Printing and Publishing Company & Others v Esselen's Estate* 1994(2) SA 1 at page 25D Corbett CJ stated clearly that all people should not be defamed unlawfully and added:-

> "I emphasise the word "unlawfully" for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (i.e. truth and public benefit, and privilege, which if successfully invoked render lawful the publication of matter which is *prima facie* defamatory."

That being the case the Chief Justice's Order can only be read as meaning that the respondent can still publish defamatory matter about applicants, provided

he does so lawfully.

Applicants making a skeletal case

The problem I had to grapple with was that the heading of the article that was the subject of these contempt of court proceedings was directed at Government. "**Muso o reka Mapolesa**" translated this means government bribes the police. This article was not translated into English, as one would expect. Since respondents counsel did not take this point *in limine*, I will not make much of this omission. The reason being that I am a fluent Sesotho speaker, one could say Sesotho is my mother tongue.

In this article it was alleged many police officers had just been promoted to help government to abort an annual general conference to be held on the 24th, 25th and 26th of that month. This article is dated 17 January 1997. Among the promoted policemen are those alleged to be on contract. It is further alleged that where the administration is proper, people on contract are never promoted. Such strange practices (it is alleged) are the work of Shakhane, Pakalitha and Makoaba (these include the first names of first and second applicants). Policemen who will not co-operate (so it is said) will be sacked. This in short is what I was referred to. The impression that is given by this article is that government among whose members are the applicants, within the month of January 1997 suddenly promoted policemen including those on contract in order to be able to disrupt a conference that would be held

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that month.

Applicants say all this is false and for that reason the respondent has committed contempt of court. Respondent answering affidavit insists this is true and that the community should be told this. Respondent adds that people who have retired and are on contract have been promoted to higher position. There are no replying affidavits from applicants.

Application proceedings are meant for those matters in which issues are simple and straightforward. They are inappropriate for dealing with substantial dispute of fact. See Herbstein & Van Winsen *The Civil Practice of the Superior Courts of South Africa* 4th Edition at page 233. The learned authors at page 366 take the matter further and say:-

> "The general rule which has been laid down repeatedly is that applicant stands or falls by the founding affidavit and the facts alleged in it."

Applicant is not expected to make a skeletal case. He must make a full case. Applicant should not bring an application where he should have forseen a dispute of fact will arise. Nowhere does applicant specifically deal with the issues raised in respondents publication. He merely makes a general denial of the truth of the contents of applicant's newspaper article and says they are false and ends there. The onus is on the applicant to demonstrate the falsity of respondents' allegations and thereby shift the onus to the respondent.

Where applicant merely makes a bare denial and expects the court to hold, he has shifted the onus, that is expecting too much of the court. The case of *Neethling v Du Preez & Others* 1994(1) SA 708 deals with onus where a State official is involved, I have indicated that under Lesotho's constitution, this matter is open, in any event it does not apply to application proceedings where issues are not expected to be fully ventilated. Trial proceedings are meant for that. Lord De Villiers CJ in *Hertzog v Ward* 1912 AD 62 at page 76 where a matter of defamation was dealt with by way of exception said:-

> "It is not necessary to plead evidence upon which he intends to rely in support of the allegation." (and at page 72 added)
> "If the charge be true, it was in the public interest that the statement should be made, but the truth of the charge cannot be enquired into in an argument on exceptions."

I have the same feeling about applications. They like exceptions were intended as a device to shorten proceedings where facts and credibility are not in issue.

Application not fashined for contempt of court proceedings

The case that has been argued before me is that of the right of Minister of the crown to sue for defamation. This right is not disputed. They must sue respondent, but that is not the same as having him convicted for contempt of court.

In the heads of argument Mr. *Makhethe* for applicants states:-

"No factual basis is alleged for the unwarranted smear that said applicants are corrupt. No names of those who were allegedly promoted are given and/or dates indicated and/or the nature of the alleged promotions indicated and/or even the number of the alleged promoted officers and or the reliability of alleged sources of information indicated and or alleged duration of alleged contractual engagements shown etc. All, both in the article concerned and the respondent's answering affidavit, is conspicuous silence regarding all the above factors of which, if respondent was acting in good faith, would have and ought to have said something about them. The absolute lack of specificity in regard to matters pointed out above, is, in our humble submission, clear evidence of falsity, malice, unfairness and irresponsibility of respondent. Respondent's failure to substantiate has to be contextualised. There is already strong, unchallenged in indisputable body of material evidence before this Honourable Court of respondent's propensity to publish recklessly and sensationally."

This eloquent passage does not help, because it does not address the issue before the court which is contempt of court. Respondent is not specifically charged with the propensity to publish recklessly and sensationally and failure to abide by a restraining order against such conduct. I have already criticised

his bad journalism and shown that he is skating on the edge of a precipice. He should be sued for what ever unlawful defamation he commits in his reckless and sensational journalism. No publication is ever sufficiently detailed, but it begs the question (in this denial), for Counsel to make a categorical statement that vagueness or extreme brevity is proof of the falsity of the publication.

Everything that applicants say is challenged and disputed by respondent. His method of challenge is very similar to that of applicants. Applicants say what respondent says is false without being specific on details. Respondent in turn says what he says is true without going into details. The only point on which respondent directly challenges applicants in the answering affidavit is that of promoting officers on contract. Applicants did not reply. As already stated, bare denials like bare assertions are bad pleadings especially in application proceedings where affidavits are both pleadings and evidence rolled together.

The onus to state a triable case is on applicants. Contempt of court is a criminal charge and for applicants to secure a conviction of respondent, they have to prove their case beyond a reasonable doubt.

In criminal proceedings such as contempt of court, the onus of proof is always on the prosecution (i.e. applicant). It can never be on respondent.

I have already shown that courts are careful not to allow pending court proceedings in defamation cases to be used as what the English call "gagging writs". In *E.R. Sekhonyana v Mamello Morrison & Ano.*, CIV/APN/50/1993 (unreported) an application was brought *ex parte* and granted on the understanding that an action for defamation would be brought before the courts. Such an action was never brought, yet through counsel's misunderstanding a newspaper was silenced during an election campaign. It is for this reason and similar ones that Van Schalkwyk J in *Mandela v Falati* 1995(1) SA 251 at 260 said:-

> "...no politician should be permitted to silence his or her critics as it is of fundamental importance that such criticism should be free, open, robust and even unrestrained."

I have already said Kheola CJ's restraining order, cannot be interpreted as a general "gagging writ".

Interdicts against invasion of rights

What seems to have been at the back of the original application was seeking a relief against the nuisance that respondent's method of journalism had become. They had a right to seek relief from the courts. I question the method they chose in a democratic society.

I was referred to Lehohla J's remarks on page 10 of the unreported judgement in CIV/APN/368/96. He never went into the merits but no one

would quarrel with the following remarks if the application was directed at the style of journalism:-

> "I would readily agree that given the onslaught of incessant crusade in "MoAfrika" newspaper geared not only at ridiculing and pilloring but on the face of it making statements which are defamatory, applicants were entitled to seek urgent relief from the High Court..."

In other words, the applicants would be seeking protection from harassment leaving respondent's freedom of expression unimpaired. If this is the meaning of Lehohla J's remarks, applicant would remain free to report, criticise and comment on applicant's political activities and their acts as Ministers of the Crown. All that would be required by applicants would be to require respondent (where he called applicants murderers and thieves) to do his duty and state who had been murdered by applicants and what the applicants have stolen to be styled murderers and thieves.

Unfortunately, in my view, on the papers before me, it seems applicants are interpreting Kheola CJ's interim order to take away respondent's rights of free speech and the right of freedom of expression. What Corbett CJ said in *Argus Publication and Printing v Esselen's Estate* 1994(2) SA 1 at 25 BE applies here where he said:

> "...but it is trite that freedom is not and cannot be...totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation."

Lest I be misunderstood, the *Esselen's Estate* case was dealt with by way of

exception. Legal proceedings had been brought by way of action and exception was later taken. Most of the defamation cases referred to have been intended to clarify the law by way of exception. Only in *Mandela v Falati* was an application silencing a critic actually brought before court. There have before been several applications to prevent publication of defamatory matter which was about to be published. Such applications are understandable because they stop harm from being done. An interdict where publication has already been made is not a practical way of dealing with defamation, because the damage has already been done. What the victim of unlawful defamation can do is to seek redress through an action of damages.

Order of the Court

On the papers before me and with the application as it stands I am unable to find applicant guilty of contempt of court. At the very worst I can only give him the benefit of the doubt because of the nature of the order relied upon. His style of journalism is very bad and sooner or later will land him into serious trouble, if he is not in serious trouble already.

On the question of costs, I order each party to pay its costs. I do this because, although respondent has succeeded, I feel had the papers been initially properly drawn and the correct remedy sought, respondent might have not been so lucky. In short, I deplore his abuse of the right of freedom of

expression and I feel my order should reflect this.

In short, I dismiss this application and there is no order as to costs.

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W.C.M. MAQUTU
JUDGE

For the applicants : Mr. T. *Makhethe*
For the respondent : Mr. K.T. *Khauoe*