CIV/APN/24/97

IN THE HIGH COURT OF LESOTHO

In the matter between:

PAKALITHA MOSISILI	1ST APPLICANT
LIRA MOTETE	2ND APPLICANT
NOTSI MOLOPO	3RD APPLICANT
SHAKHANE MOKHEHLE	4TH APPLICANT

and

DR. NTSU MOKHEHLE	1ST RESPONDENT
MOLAPO QHOBELA	2ND RESPONDENT
TSELISO MAKHAKHE	3RD RESPONDENT
NTSUKUNYANE MPHANYA	4TH RESPONDENT
'MOLOTSI KOLISANG	5TH RESPONDENT
RATHALA RAMOLAHLOANE	6TH RESPONDENT
SEKOALA TOLOANE	7TH RESPONDENT
NTJA NCHOCHOBA	8TH RESPONDENT
MALAISA MAHOSI	9TH RESPONDENT
MOHAILA MOHALE	10TH RESPONDENT
LEBENYA CHAKELA	11TH RESPONDENT
QOANE PITSO	12TH RESPONDENT
MARTIN MOHOSHO	13TH RESPONDENT
KHATLANE MOLOI	14TH RESPONDENT
'MAPONTSO SEKHESA	15TH RESPONDENT
THULO MAHLAKENG	16TH RESPONDENT
BASUTOLAND CONGRESS PARTY	17TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice G.N. Mofolo
on the 14th February, 1997.

This application was brought to court by applicants on 23 January, 1997 claiming an order as follows:-

1. That a Rule Nisi do hereby issue calling upon respondents to show cause, if any, on a date to be determined by this Honourable Court why:-

   (a) The periods of notice required by the Rules of Court shall not be dispensed with on account of the urgency of this matter;

   (b) 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th 14th and 16th respondents shall not be committed for contempt of court in respect of the order or Mofolo, J. of January 10th, 1997 in CIV/APN/1/97 for such period as this Honourable Court may determine;

   © In view of the fact that no necessary preparations have been made by the outgoing National Executive Committee for the holding of the 1995 Annual Conference, the holding of the 1995 Annual Conference on 24th January, 1997 shall not be cancelled;

   (d) The alternative order of Mofolo, J. in CIV/APN/1/97 directing the Leader of the Basutoland Congress Party to make necessary preparations for the convening of such conference for the

weekend commencing on 7th February, 1997 shall not be invoked;

(e) Respondents shall not be directed to pay the costs of this application only in the event of opposition;

(f) Granting applicants such further and/or alternative relief as this Honourable Court may deem fit.

Lehohla, J.granted the application adding that respondents could anticipate the rule by giving 48 hours' notice to applicants if they so wished in terms of Rule 8(18) of the rules of court but otherwise the rule nisi was made returnable on 27th January, 1997 at 9.30 a.m. or so soon thereafter.

Respondents citing Rule 8(18) of rules of this Court, 1980 anticipated the rule and made it returnable on 24 January, 1997. When, on 24 January, 1997 the matter was argued it was Mr. Pheko's argument for the applicants that in terms of the order of Lehohla, J. the order could only be anticipated within 48 hours in terms of the rules and that 48 hours having not expired from the time the order was given and lodging of the application for anticipation in would not be said that the rule was anticipated and accordingly the matter could not proceed and had to proceed on 27 January, 1997 as ordered by Lehohla, J.

On the other hand, it was Mr. Khauoe's submission that because of the

urgency of the application the court was obliged to allow anticipation of the rule notwithstanding provisions of Rule 8(18) of the Rules of this court. The court after lengthy argument granted application for anticipation and indicated its reasons would follow and the following are the court's reasons:-

Before giving its reasons this court will digress for a little while to deal with Mr. Pheko's application in another area of the proceedings.

On 24 January, 1997 it so turned out that from the bar Mr. Khauoe submitted his answering affidavit to court saying Mr. Pheko had refused earlier to receive same. Mr. Pheko strongly objected to the procedure saying court papers could not be served unless they had gone via the Registrar as this was standard practice and if the court accepted them as it did it was necessary for him to be given time to reply and once more he quoted the 48 hours rule referred to above. While the court agreed with Mr. Pheko that it was his right to reply the court ordered that the application would in any event be proceeding on Saturday the 25th January, 1997 at 8.00 a.m. as conference was sitting.

Mr. Pheko then submitted that while the court had rightly recognised his right to reply time given was too short and flew in the face of the 48 hours rule and there

was no possibility of finding deponents to the affidavits he intended compiling within such a short space of time and as the application was interlocutory he was asking for leave to appeal and he stated his reasons for appeal. Leave to appeal was not granted by the court. In the course of his address Mr. Pheko had repeatedly said that he was astounded by the court's remark that the conference was sitting. This court was also amazed by Mr. Pheko's ability to make mountains out of mole-hills. The court was conscious of the fact that, from the papers before it it appeared delegates were arriving on 23 January, 1997 and on 24 January, 1997 were gathered and expecting to hear from the court as to the progress of the application. If Mr. Pheko was surmising that the court was aware the conference was proceeding he was terribly mistaken for there is no way the court could come by this information. Indeed by proceeding post haste it was the intention of the court to relieve delegates' anxieties as to the fate of the conference.

Back to my reasons for allowing anticipation.

Rule 8

sub-rule (18) reads:

> Any person against whom an order is granted ex-parte may anticipate the return day upon delivery of not less than 48 hours notice.

The sub-rule paraphrased means that any person against whom an order is granted shall give 48 hours to the other party if he wishes to anticipate the rule and unless the said 48 hours notice is given the rule may not be anticipated. Substantially, this was Mr. Pheko's submission. But this sub-rule is to be read with sub-rule 22(a) which reads:-

> In urgent application the court or a judge may dispense with the forms of and service provided for in these rules and dispose of such matter at such time and place and in such manner and in accordance with such procedure as The court or judge may deem fit.

This sub-rule, also paraphrased, gives to the court or judge discretion as to the time and place, manner thereof and procedure to be adopted as the judge may deem fit of disposing of an urgent matter whether it be at night time or on week-ends.

In my ruling wherein Mr. Pheko applied for matters that were not part of his application to be introduced this court had the occasion to remark quoting case of Highfields Milling Co. (Pty) Ltd v. A.E. Wosmald v. Sons, 1966 (2) S.A. 463 (E.C.D.) at p.465 that

> "___ considerations of justice and fairness must be of prime importance when the court is concerned with the implementation of procedural Rules and as was said in Shill v. Milner, 1937 A.D. 101 at p.105."

> 'Pleadings are made for the court, not the court for pleadings" 'so that it can be said Rules of Court are designed for the court whose business is to secure the conduct of litigation in a manner calculated to serve the just requirements of the parties.'

In the same Highfield case I did express the view that O.Hagan, J. appeared to be of the view that he could not justify an inference that rules of court (particularly Rule 8 which is the same as our Rule 8) contemplate the withholding from the court a discretionary power which, over a period of many years, has been exercised in all courts of South Africa and which has its foundation in principles of convenience and fairness.

The essential point this court is making is that while rules of court are there to be observed and followed, consideration of extreme urgency and exigencies of convenience and fairness may require their relaxation other than unstinted observance. Indeed in some cases the urgency may be so great that no time is available to prepare documents instead of which viva voce evidence may be heard. In urgent matters it has been held that the court is entitled to admit hearsay evidence in an affidavit provided the source of the information and grounds for belief in its truth are stated - see GAL. v. TANSEY. NO. 1966 (4) S.A. 555 © at p. 558H - 559A; TORIGAMI MARITIME CONSTRUCTION Co. LTD. v. NISSAO - IWOI

Co. LTD. 1977 (4) S.A. 682 © at p. 692B; SOUTHERN PRIDE FOODS (Pty) LTD v. MOHIDIEN, 1982 (3) S.A. 1068 © ; SYFRETS MORTGAGE NOUNNEES Ltd v. CAPE St.FRANCIS HOTELS (Pty) Ltd, 1991 (3) S.A. 276 (SE).

When Mr. Mda in reply to Mr. Pheko's submissions raised the question of urgency, Mr. Pheko objected on the ground that urgency was not canvassed in respondents affidavits nor was it placed in issue. Mr. Mda countered, however, that this was a question of law or as he put it a point of law. Mr. Pheko refuted this saying urgency was a question of fact than law and that, in the circumstance it was imperative for the court to decide the issue.

Salmond in his Jurisprudence (12th Ed.) has this to say at p.66

> The term question of law is used in three distinct though related senses. It means, in the first place, a question which the court is bound to answer in accordance with a rule of law a question which the law itself has authoritatively answered, to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. All other questions are questions of fact - using the term fact in its widest possible sense to include everything that is not law."

It also appears that matters of fact are capable of proof and subjects of evidence adduced for the purpose. In determining questions of fact the court is seeking to ascertain the truth of the matter; in determining questions of law the court seeks to discover the right or justice of the matter. I may interpose to say while questions of law are easily determinable and identifiable, questions of fact tend to be elusive - hence why the Shorter Oxford English Dictionary describes fact as:

> "something that is alleged to be, or might be - the circumstances and incidents of a case as distinct from their legal bearing."

It cannot be said that a will or testament or for that matter succession is something that is alleged to be for it is and what's more, these legal concepts are governed by a body of rules recognised in a specified department of action. This cannot be said of "urgency" which is not governed by a body of rules nor does it bear the stamp of certitude for what is deemed urgent, when full facts are examined, may turn out, after all, not to be so urgent. Also to give urgency a sting, it must be accompanied or, as it were, assisted by a certificate of urgency.

The obfuscation and uncertainty lies in the Anglo-American legal system of jurisprudence which divides law and fact reserving the one to a Judge and the other to the Jury - a system which, to those who are unused to, further compounds

individual comprehension of the concepts and renders them all the more tenuous. Urgency is not and can never be a question of law or as is said, a point of law and Mr. Mda's arguments in this regard were disregarded.

Mr. Pheko has also said points which were raised in applicants' founding affidavits were not effectively denied nor were issues therein raised in respondents' answering affidavits and that this being the case the application was to be granted. Mr. Mda disagrees saying even were the issues not raised in affidavits or put in issue or even were the issues not raised in affidavits or put in issue or even were the application not opposed, it was no reason for the court to grant the application. I agree for the rule is not invariable. Thus in a criminal case the fact that the accused person is silent throughout the proceedings does not necessarily attract a finding or verdict of guilty for for one thing there may be no evidence against him and for another he may have been charged with a non-existent offence. Equally, in a civil case the fact that a defendant is silent is no reason to find against him for the primary rule is that the plaintiff must first discharge the onus cast upon him and failure to do so may result in the defendant being given benefit of the doubt and absolved from the instance.

Mr. Pheko's susceptibilities being that despite the order of Lehohla, J. it seemed conference was proceeding Mr. Khauoe was asked by the court to investigate and on his return told the court he was not prepared to commit himself. Mr. Pheko then applied that in the light of prevailing circumstances he wished to make an application relating to the conduct of conference. While Mr. Khauoe did not oppose the application he intimated that it was to be a substantial application. Mr. Pheko then lodged an application intended to canvass proceedings of the 24 January, 1997 conference by asking that:-

(1) Members of the outgoing National Executive Committee or such of them as could be found appear before court to explain why they proceeded with conference despite the order of Lehohla, J.

(2) To introduce new matters.

New matters were understood by the court as:-

(a) for respondents to show cause why they cannot be committed to gaol for contempt of Lehohla, J's order.

(b) why the conference cannot be annulled.

The court granted the application though, at this juncture, it is worth mentioning that Mr. Pheko moved his application as he did for, according to him, matters raised in his substantive application were no longer relevant being, as he

said, of academic interest as respondents had proceeded with the conference in any event. It is also worth mentioning that it was after the court granted the application that Mr. Khauoe informed the court that the conference had been, after all, proceeded with to its conclusion so that the only question which remained for determination was new issues which Mr. Pheko introduced and this court means to confine itself to these.

The basis of Mr. Pheko's argument was that

(a) Respondents were to be committed to goal for contempt;

(b) Conference was to be annulled and the leader of the Basutoland Congress Party Dr. Ntsu Mokhehle convene and run a freshly called conference;

© Conference to be run on substantially the same terms and conditions as the aborted conference of March, 1996;

Regarding (a) above, the order of my brother Lehohla, J.reads, inter alia:-

1. A rule nisi do hereby issue calling upon respondents to show cause, if any, on 27th day of January, 1997 at 9.30 a.m. in the forenoon or so soon thereafter as the matter may be conveniently heard why:-

   (a) The periods of notice required by the Rules of Court shall not be dispensed with on the account of the urgency of this matter;

   (b) 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th and 16th Respondents shall not be.

committed for contempt of court in respect of the order of Mofolo, J. of January 10th, 1997 in CIV/APN/1/97 for such period as this Honourable Court may determine;

© In view of the fact that no necessary preparations have been made by the outgoing National Executive Committee for the holding of the 1995 Annual Conference, the holding of the 1995 Annul Conference on 24th January, 1997 shall not be cancelled;

(d) The alternative order of Mofolo J. in CIV/APN/1/97 directing the Leader of the Basutoland Congress Party to make necessary preparations for the convening of such conference for the weekend commencing on 7th February, 1997 shall not be invoked;

It is common cause that respondents proceeded with the conference despite this order and what's subject of contempt proceedings emerges from and is related to Lehohla J's order © above. It is on this basis Mr. Pheko would have this court commit respondents for contempt; I am to mention that so far as (b) above is concerned, even if this event cannot be said to have been overtaken by time, the prayer being based on premature, pre-emptive and rather anticipatory allegations there is no way this court could have found respondents guilty of contempt considering that it is alleged respondents defied the court's order in CIV/APN/1/97 by not holding a conference when, in fact, such a conference was held and hence the application for contempt of Lehohla, J's order.

Mr. Pheko does also seem to have been of the view that the order of 10 January, 1997 in CIV/APN/1/97 was defied and disregarded amounting to contempt in that:-

(i) in terms of the order the Provincial delegation was as it should have been at the March, 1996 conference; although this court did not decide the issue, it was always understood that in any future conference the delegation would be the same; that the conference deviated from this is hardly contemptuous - it is just that respondents misunderstood the tenor of the order. but be this as it may, the court made no specific order relying, rather, on the good commonsense of the respondents. Noticeably, in this regard Mr. Pheko has said respondents proceeded as they did to benefit themselves at the expense of theapplicants; I agree.

(ii) A new Credentials Committee was elected;

(iii) A newElections committee was elected;

(iv) Observers were restricted;

(v) There were recommendations/resolutions from constituencies;

(vi) Interested delegates were not invited some of whom were members of the Credentials Committee.

To this court these acts are nothing but errors of judgment and such as are worthy of considetation in deciding whether or not to annul the conference instead of committing respondents for their contempt:

Mr. Pheko has also submitted that in defiance of the court's order in CIV/APN/1/97 of 10 January, 1997 apart from the court ordering respondents to hold conference on 24 January, 1997 there was an accompanying order forbidding respondents from administering affairs of the B.C.P. save holding a conference. And yet, in defiance and disregard of this court's order respondents went to court claiming to publish Makatolle Newspaper and did publich same. To this charge Mr. Mda has reacted by saying his clients were not served with the order and it does appear orders issued by the court were conflicting the court not having said its reasons would follw in court but issuing them thereafter. Effectively Mr. Mda was submitting that respondents were not aware of the court's order in this regard. What's of material importance in contempt proceedings though, is the question of malice.

Before reciting the law as to contempt, this court would like to observe that in prayer © nowhere are respondents stopped from proceeding with conference, a fact which cannot be implied. Besides, if it was intended that the application be a full blown interdict, there should have been allegations that applicants had no other remedy (unless `no other alternative' stands for this); but certainly there should have been an allegation that applicants will suffer irreparable harm if the conference is proceeded with.

In HADKINSON v. HADKINSON, 1952 (2) A.E.R. 567, Romer, L.J. giving judgment in a contempt case said:

> "It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it, unless and until that order is discharged."

Further,

> The first is that anyone who disobeys an order of court is in contempt and may be punished by commital or attachment or otherwise. The second is that no application to court by such person will be entertained unless he has purged himself of this contempt.

In KOTZE v. KOTZE, 1953 (2) S.A. 184 © at p.187 C Herbestein, J. made it clear

> "Disregard of an order of court is a matter of sufficient gravity, whatever the order may be."

It will be recalled that these are precise terms in which Mr. Pheko addressed this court in seeking respondents' committal to gaol for contempt. But apparently for there to be contempt the question is whether the order of the court was ad factum praestandum, i.e., directing the respondents to do certain things. Going back to Lehohla, J's order and particularly prayer © which seems relevant it (sic) reads:-

> In view of the fact that no necessary preparations have been made by the outgoing National Executive Committee for the holding of the 1995 Annual Conference, the holding of the 1995 Annual Conference on 24th January, 1995 shall not be cancelled.

A case which answers grave shortcomings in the above order and draws attention to the implications of the rule ad factum praestandum is MKHIZE v. SWEMMER and OTHERS, 1967 (1) S.A. 186 (D., C.L.D.) where, as to a Rule Nisi Fannin, J. said at p. 192 H.

> "It is true as pointed out by Caney, J. in Maharaj Brothers v. Pietersè Bros. Construction (Pty) Ltd and Another, 1960 (2) S.A. 232 (N.) at p.236H, that the language of the section is wide and embraces any rule nisi which has the effect of an interim interdict; but it cannot, in my view, be said that a rule nisi does have that effect unless it prevents the doing of some act by the respondents pending the return date. Held the rule nisi had no such effect. (I have underlined).

The order I have referred to above does not have the effect of preventing the doing of some act by respondents pending the return date and is therefore not ad factum praestandum. PUBLIC MOTORS (Pty) Ltd. 1971 (2) S.A. 516 (R.) (a case I will hopefully come back to later) speaks of 'temporary curial intervention' which means, in the view of this court in relation to the present inquiry, 'stopping the

respondents from proceeding with the conference pending the result of the application.' a necessary assertion lacking in the court order referred to supra.

In Public Motors above this is what Beck, J. said regarding a proceeding Ex-Parte at p. 518 F - H:

> 'The procedure of approaching the court ex-parte for relief that affects the rights of other persons is one which, in my opinion, is somewhat too lightly employed. Although the relief that is sought when this procedure is resorted to is only temporary in nature it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard and it is, to that extent, a negation of the fundamental precept of audi alteram partem. It is a procedure that should be sparingly employed and carefully disciplined by the existence of factors such as urgency, or well-grounded apprehension of perverse conduct on the part of a respondent who is informed beforehand that resort will be had to the assistance of the court, that the course of justice stands in danger of of frustration unless temporary curial intervention can be unilaterally obtained."

This court holds that these sort of applications (Ex-Parte applications) are to be resorted to sparingly and that in appropriate cases respondents are to be notified in advance that unless they desist from their threatened wrongs or action temporary curial intervention will be unilaterally sought.

And again Beck, J. proceeded on p.519E

> 'The fear that, if this were to be done (giving respondent notice that an application would be made to court) the respondent company would act perversely in frustration of the applicant's legitimate interest was an inference that rested upon nothing said or done by any person in control of the management of the respondent company _____ ".

Nor indeed that on 23 January, 1997 respondents were in a state of unreadiness to hold the conference rested upon anything said or done by them. But Mr. Pheko's contention rested more on the fact that the respondents had, contrary to the court's order, allowed only the Provincial Committee to represent the Provinces. Mr. Pheko appears to have inputted that this was derogation of the court's order. I have discussed Provincial delegation above but I think the question must be put in its proper perspective.

In CIV/APN/84/96 the question of Provincial delegation was argued at length and respondent's counsel - especially Mr. Khauoe pleaded with the court to decide the issue. But because it was not part of the application and there having been no application to make it part of the relief prayed for and more importantly because this court considered it a political question which could be better resolved by the B.C.P. itself, the court made no decision in this regard and left the question wide open.

Significantly, Mr. Khauoe urged the court's decision on the question because he understood the Provincial delegation as not only controversial but also undecided. How the respondents in the conference of 24 January, 1997 decided in favour of the Provincial delegation as restricted to the Provincial Committee baffles this court for Mr. Ramolahloane had himself in the March, 1996 conference in no way restricted Provincial delegation to the Provincial Committee. What's more, the conference of 24 January, 1997 was a re-run of the conference of March, 1996 and no new items were expected to be introduced nor could there be a departure from the conduct of the March, 1996 conference except in respect of a few exceptions discussed intra..

In ALISON, N.O. v. NICHOLSON, 1970 (1) S.A. 121 (R.) Macauley, J's view seems to have been that in an application for contempt of court, whilst the order grants the applicant the right to assume custody and control of the company, it does no more than to define rights, and decides, in his view, no rights of the applicant vis-a-vis the respondent. That even if the order imported all the rights of a judicial manager, the situation would not have made it one ad factum praestandum. And then the learned Judge continued at p.124E:

> "It follows that the respondent's refusal to hand over control to the applicant unconditionally or to vacate the premises is not one in derogation of the authority

> of the court, but simply a denial that the powers and rights which this court gave the applicant entitle him to act as he purported to do. Such derogation as there was arose in dispute of the applicant's rights as conferred by the order. Respondents has, therefore, not disobeyed any order directed at him."

It also appears that respondents' case was a simple denial that the powers and rights which the court gave the applicants entitled them therein for the derogation arose in dispute of applicant's rights (if any) conferred by the court.

Macauley, J. then continued at p.125

> "I conclude, therefore, that the present proceedings do not seek committal of the respondent on the footing that he committed a contempt of a criminal character. Had they assumed this character the fact that the order of 7th August 1969 is not ad factum praestandum would not be crucial. The essence of the complaint would in that case have been a deliberate setting the court at defiance by treating its order, whatever its character, as unworthy of notice."

Respondents were, in the like manner, concerned with upholding and observing the order to hold the conference as against treating the order as unworthy of notice. On behalf of the respondents, it was also represented that the order was understood as having asked respondents to show cause why the conference could

not be cancelled.

Herbstein and van Winsen (Civil Practice of Superior Courts in South Africa (p.33)) says contempt of court can take the form committed in facie curiae or a wilful refusal or failure to comply with an order of court - being what we are concerned with in these proceedings. He says one of the requisites is that the order should have been served on the respondent personally or to have come to his personal notice.

Mr. Mda for the respondents has argued that particularly relating to the order in CIV/APN/1/97 to convene conference of 24 January, 1997 the court's notes do not show that there was an order prohibiting respondents from administering the affairs of the B.C.P. vis-a-vis Makatolle. He says the courts notes do not reveal this. Mr. Pheko has countered and rightly so in the view of this court that court's notes are not exhaustive. To this Mr. Mda has said in the event there does appear to be two orders; one contained in the court's notes and another in the courts reasons for judgment. Concerning the latter, Mr. Mda has submitted that in court the court never said it's reasons would follow as they did and consequently respondents were not served with the order. This court finds Mr. Mda's argument peculiar in that his address to court reveals that he was aware of the court's reasons

for judgment and it can, necessarily, be deduced from this that if he was aware of the reasons for judgment, it can be safely inferred that his clients (respondents) are aware of the courts reasons for judgment.

Authorities seem to be agreed that if the failure to comply was due to inability to do so, or flows from a mistake as to what was required of them, or he bona fide believed that he was not required to comply with the court's order, then a committal for contempt will not be granted - see Brink v. Brink, 9 C.T.R. 6; McKinnon v. McKinnon, 19 C.T.R. 106; Reid v. Reid, 1911 E.D.L. 157; Turner v. Llewellyn and Wigginton, 22 S.C. 153; Rollo-Wilke v. McMillan, 1928 W.L.D. 47. Snasball v. Snasball, 1930 G.W.L. 19.

Also, depending on the circumstances, and whether or not the court granted committal, the court has either ordered costs or refrained from doing so. But apparently to mark its displeasure for not complying with an order of court the court has granted costs.

In Clement v. Clement, 1961 (3) S.A. 861 (T.) it was held it was possible that the appellant (who refused to release a child despite the courts order), might have believed that in doing so he was acting in the best interests of the child. That,

therefore, his disobedience of the order of court had not been shown to be mala fide. It can be said respondents believed they were acting in the best interest of justice and the party to proceed with the conference.

Consolidated Fish Distribution (Pty) Ltd v. Zivic, 1968 (2) S.A. 517 © highlights important aspects of contempt. It divides contempt into two classes, namely: "constructive" and "direct" contempt. It was held in this case that in limited class of cases referred to as `constructive' contempt applicant for committal of the respondent for contempt of court has to allege and prove mala fides; that in the more usual case of a `direct' contempt, such as a deliberate disobedience of an existing order of court, all that need to be proved is wilfulness mala fides being inferred. This case falls under direct contempt requiring wilfulness to be proved.

But then again according to Pollock (Jurisprudence and Legal Essays) malice is synonymous with `wrong motive' and it appears any indirect motive other than a sense of duty is what the law calls malice. Respondents in what they did were motivated by a sense of duty albeit the wrong way. It is also to be understood that malice is deemed to be the equivalent of animus injuriandi and can never mean ill will or spite but the imprudent and indiscreet manner of acting. Jurists, though, seem agreed that fraud is opposed to malice in its popular sense in that one acts

fraudulently when the motive of wrongdoing is to derive some material gain or benefit for oneself whatever scheme is employed. But one acts maliciously when the motive is the pleasure of doing harm to another rather than the acquisition of any material benefit for oneself. Thus to steal property is fraudulent but to damage it is malicious.

Respondents did not proceed with the conference to its conclusion for the sheer pleasure of it but to obtain an advantage for themselves and this can hardly be deemed malicious. Respondents have also shown that they were desirous of obeying the order in CIV/APN/1/97 but in the process misunderstood or misconstrued the order of Lehohla, J.; further, as I have already said, respondents proceeded with conference to benefit themselves. On the other hand, one really doubts whether, had Lehohla, J. had full benefits of the facts he would have granted the order.

In the result the rule is discharged but only to the extend that the application to have respondents committed to prison for contempt of Lehohla, J's order does not succeed and respondents are found not guilty of contempt or at all and are liberated. As the conference was proceeded with to its conclusion, the question of cancellation of the conference being now academic, to this extend the rule is also discharged.

I now come to the consideration whether in the light of respondents' handling of the conference it can be said that conference proceedings were regular or whether, being irregular, the conference of 24 January, 1997 should be annulled and held invalid and flowing from this the alternative order of this court as contained in CIV/APN/1/97 take effect.

The outgoing National Executive Committee and the respondents in this application have in some areas not been honest to themselves and in the course of this judgment I have referred to their tendency to hit below the belt. When the March, 1996 conference was nullified and the holding of a fresh conference was ordered, it was certainly understood that with but a few exceptions the conference would be a blue print and photocopy of the aborted conference. The notable exceptions were:-

(1) Taung delegation.

(2) Women and Youth delegation.

(3) The Elections Committee.

This had to be for amongst other things respondents and others had complained that agenda items were shelved and it was desirable to deal with them;

items complained of could only be those contained in the agenda of March, 1996 and it is pure mendacinty to say new items can form part of the March, 1996 agenda.

Applicants were saying in CIV/APN/84/96 when the Deputy Leader was elected Provincial votes were set aside and wanted these votes to be included. The court having agreed with the applicants asks itself who, and by what authority did the March, 1996 format change? Respondents are now saying the court ordered that the conference be run constitutionally. I agree but it was no authority to change the March, 1996 conference format except in instances I have listed above. Respondents effort is no more than pulling wool over the eyes of the court.

Respondents in the conduct of 24 January, 1997 conference are guilty of gross manipulation of political craft and the entire proceeding is a sorrowful and pitiful catalogue of unenforced errors of judgment. Consider not inviting necessary participants to the conference including some members of the Credentials Committee of March, 1996?

Generally, the court believed that its judgment in CIV/APN/84/96 was understood - and respondents would not take advantage of it. As I have said again

and again, short of contempt of the court's order, it appears that respondents are won't to twist facts and act in a partisan manner and such as benefits them at the expense of their rivals. Such a state of affairs cannot be tolerated by this court. This court is not saying that respondents are pervidious but certainly it does not behove them to have acted as they did.

Respondents have not gone about the 24 January, 1997 conference the right way, but they have shown their willingness to abide the order of court to hold conference though, as I have said, in a wrong and misguided way. This court has given serious thought to the submission that the courts alternative order in CIV/APN/1/97 come into play in view of respondents not having abided by the court's order and particularly as necessary preparations were not made to hold conference. I have said this is not the right state of affairs in this regard and that the application was in any event premature. The court has also been urged that the respondents can no longer be trusted and the alternative prayer operate.

These are sound submissions worthy of commensurate attention by court. Nevertheless, the court takes the Leader of the Basutoland Congress Party as part and parcel of the National Executive Committee even should such a committee be be a caretaker committee and for the time being as respondents are. To allow the

leader to act alone would be to divorce him from his constitutional leadership as enshrined in the B.C.P. Constitution.

This court is not prepared to arrogate to itself powers lying outside its province and to cut the constitutional umbilical cord between the leader of the Basutoland Congress Party and its National Executive Committee even should the latter be such for the time being. Such a precedent in the scheme of things would be disastrous for constitutionality in this country. The leader can act or would act as suggested only if the existing National Executive Committee for the time being is unwilling to perform its functions and this court has not found that it is unwilling to perform such functions as are ordered by this court save having gone about them in the wrong way; moreover, operation of the alternative prayer as pleaded can only come into its own as a crisis option and in these proceedings this court has not been told that such a crisis has been reached requiring drastic action as suggested by counsel for the applicants.

Accordingly, the conference of 24 January, 1997 is hereby annulled and held invalid and the proceedings of the said conference are set aside. It is further ordered that the outgoing National Executive Committee of the Basutoland Congress Party and respondents herein convene and hold a fresh conference on 28th day of

February, 1997 failing which the Leader of the Basutoland Congress Party to hold such a conference on a date and time to be fixed by him and in doing so enlist on such assistance as may be necessary to the convening and holding of such a conference.

For the benefit of the outgoing National Eexecutive Committee and respondents herein the following are the guidelines:

1. All delegates including the Provincial delegation as at March, 1996 conference is to be invited;

2. The agenda to be as it was at March, 1996 conference;

3. This court commented adversely in CIV/APN/84/96 about the propriety of candidates to the National Executive Committee also serving on the Elections Committee and this is one of the reasons why the Conference of March, 1996 was set aside. The procedure is not to be repeated and candidates to the National Executive Committee are not to serve on the Elections Committee and such candidates as were elected to the Elections Committee are to be replaced.

4. Taung constituency is to be represented by 13 delegates.

5. Women and Youth League is to be represented by 6 Delegates each;

6. Invitation to delegates be in writing.

7. Observers to enjoy the same status as at March, 1996 conference.

As to costs, it is true that applicants and respondents have partially succeeded and failed making it unnecessary to award costs. However, to show its displeasure in the manner the respondents have gone about the conference of 24 January, 1997 this court was inclined to order costs. But then the court is reminded that costs are punitive. The way these proceedings were conducted and the very serious repercussions flowing therefrom disincline the court to award costs and accordingly there will be no order as to costs.

I come now to a most disturbing feature of these proceedings. Throughout the proceedings a cacophony of intolerance and rowdiness amounting to invasion of the dignity of this court pervaded the court's atmosphere. Counsel continuously interferred with and interrupted the courts ruling ad infinitum and ad nauseam. There were times when counsel would not be called to order and literally usurped the functions of the court.

This is to give notice that in future any counsel who does not heed the court's ruling or warning or will not take his seat when so ordered by the court will be severely punished.

G.N. MOFOLO
JUDGE
13th February, 1996.

For the Applicants: Mr. Pheko

For the Respondents: Messrs Khauoe and Mda