CIV\APN\304\96

IN THE HIGH COURT OF LESOTHO

In the Application of :

MOAFRICA 1st Applicant
CANDI BATABANE RAMAINOANE 2nd Applicant

Vs

THE ATTORNEY-GENERAL Respondent

JUDGMENT

Delivered by the Hon. Mr Justice M L Lehohla on the
9th day of April, 1997

The applicants moved an application by way of Notice of Motion on 26th August, 1996. The application was heard on 11-2-97 after two postponements spanning the period between 6-2-97 and 7-2-97.

The application is couched in the following terms :

1. That the directive by the Cabinet of Lesotho Government at its meeting of the 23rd day of July 1996 that no advertising shall be done through the First Applicant be declared null and void.

2. That the Respondent be ordered (sic) pay the costs of this at attorney

and client's scale.

3. That the applicants be granted such further and\or alternative relief.

The facts of this application fall within a very narrow compass, and in any case the entire matter was disposed of on the basis of some question\s of law raised *in limine*.

The only affidavit filed is that filed by the 2nd applicant who deposes that he is the Editor-in-Chief of the 1st applicant; the respondent having preferred, in response to the application, to act in terms of Rule 8(10)(c) of our High Court Rules. The Rule provides that :

> "Any person opposing the grant of any order sought in the applicant's notice of motion shall:
>
> (a) .....
> (b) .....
> © if he intends to raise any question of law without any answering affidavit, (sic) he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question".

The applicants have founded their case on Annexure "CRR1" attached to the

applicant's affidavit.

This is a savingram emanating from the Government Secretary and addressed to all principal secretaries and heads of departments dated 5-8-96 saying :

> "At its meeting of Tuesday 23 July, 1996 Cabinet directed that
>
> (I) advertising in local newspapers by Government Ministries and institutions including parastatals should give first preference to newspapers that enjoy wide distribution across Lesotho,
>
> (ii) no advertising shall be done through Mo-Afrika because of the negative stance this paper has adopted towards the Government".

In his averments the 2nd applicant states that he received information that the Cabinet of Lesotho directed that no advertisements should be done through the 1st applicant. He further said he had since obtained a savingram "CRR1" referred to earlier in this judgment. While just on this I may just point out that the statement that the direction was that no advertisements should be done through the 1st applicant is misleading and out of context because as plainly shown in paragraph (I) of "CRR1" the restriction regarding advertisements applies to advertising by Government Ministries and institutions or parastatals as opposed to the impression given in the averment that any form of advertising by any organisation besides the above which I have underlined is equally affected by the restriction. This

impression *ex facie* the second applicant's averment, in my view is unfortunate and seems to have deliberately been calculated to mislead. The rule in interpretations provides that the meaning created by unfortunate use of words (i.e. deliberately out of context) shall be interpreted against the author. If the prohibition to treat with the 1st applicant extended to other organisations beyond Government and its direct or indirect agents then I would have had no doubt that the applicants had legitimate fear that their Constitutional rights against discrimination were being violated by the Cabinet's decision. This is the impression clearly, though falsely, created by the 2nd applicant in his averment as my close scrutiny in perusal of the papers reveals. On this ground alone it would have been fitting to dismiss this application.

The 2nd applicant complains that when the above decision by Cabinet was made he was not consulted as the Editor-in-Chief nor given proper notice of the intended decision; thus was his paper denied an opportunity of being heard contrary to a legal right it is entitled to enjoy in terms of Section 12 of the Constitution of Lesotho. Further that the 1st applicant was never given an opportunity to deny or admit the charge of negative stance referred to above; thus further being denied its Constitutional right.

The 1st applicant asserts that it has a right of freedom from discrimination in

terms of Section 18 of the Constitution; and I agree. It accordingly points out that Annexure "CRR1" clearly shows that the 1st applicant is being discriminated against. But while it is true that Constitutional rights exist for the enjoyment of all citizens alike it should not be overlooked that there are legal principles which must be observed in the process. One of them is that a party seeking recourse to the courts of law must do so with clean hands. I have had regard to "CRR1" and have observed that it is addressed to certain specific classes of persons in Government; namely, Principal Secretaries and Heads of Departments. None of the applicants falls under any of these classes yet without saying how this document came into the possession of both or either of them the applicants expect this Court, to which they have not confided, to enforce their rights under the Constitution. Thus an inference is irresistible that "CRR1" came into the applicants' possession by unlawful means.

The 2nd applicant states that the 1st applicant has a legal right of freedom of expression under the Constitution and that this right can only be curbed in terms of the law, and I agree with that. See Section 14.

He further states that parastatals, not being arms of Government of Lesotho as such, are free from Cabinet direction purportedly exercised by means of "CRR1".

He goes on to state that he is advised that whenever a body is to give a decision prejudicially affecting rights of an individual, that individual has a right to be heard before action is taken and complains that the 1st applicant was never given such a right. He finally states that "CRR1" is in contravention of the Constitution of Lesotho and should be declared null and void to the extent of its inconsistency with Section 2 thereof.

In response to all the grievances that the applicants have raised I deem it profitable to make reference to Lord Reid's remarks in ***Conway vs Rimmer*** (1968) 1 All ER 874 at 888 on the status of a document which is similar to "CRR1" as a privileged document which as such is not subject to production in court proceedings. The learned Judge said :

> "I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed..."

> Adding his voice to the foregoing Lord Pearce at page 910 said :

> ""Obviously production would never be ordered of fairly wide classes of documents at a high level. To take an extreme case, production would never be ordered of Cabinet correspondence, letters or reports on appointments to office of importance and the like...."

Not to be behindhand with his contribution to this important subject especially with clear focus on the interdepartmental minutes and correspondence regarding which I know of no more common than savingrams in Government departments Lord Upjohn (see) page 912 at 914(H-I) said :

> "No doubt there are many cases in which documents by their very nature fall into a class which requires protection such as, only by way of example, Cabinet papers, foreign office despatches, the Security of State, high-level interdepartmental minutes and correspondence, and documents pertaining to the general administration of the naval, military and air force services. Nearly always such documents would be the subject of privilege by reason of their contents but also by their "class", in any event qualify for privilege. So, too, high-level interdepartmental communications, to take, only as an example on establishment matters, the promotion or transfer of reasonably high-level personnel in the service of the Crown; but no catalogue can reasonably be compiled. The reason for this privilege is that it would be quite wrong and entirely inimical to the proper functioning of the public service if the public were to learn of these high-level communications, however innocent of prejudice to the State the actual contents of any particular document might be; that is obvious". (My underlining).

Relying on the above authority I am of the firm view that Annexure "CRR1" is improperly before this Court though I would be hesitant to expunge it from the

record for the simple reason that I have had to rely on its contents to illustrate the unfortunate attempt employed by the applicants to create a wrong impression. On that basis alone of improperly placing "CRR1" before Court the application stood to be dismissed as the heart would thereby have been taken out of the matter.

However I propose henceforth to deal *seriatim* with the applicants' complaints bearing in mind that some of them are repetitive. The 1st applicant feels aggrieved that it was not given a hearing before the Cabinet took a decision that was communicated by the Government Secretary to the Principal Secretaries and Heads of Departments. I find difficulty in seeing how the principle of *audi alteram partem* can be of relevance in a situation where the Government or any other party for that matter, involved in some commercial undertaking, such as advertising with newspaper agencies, decides that it will not treat with Agency "X". How and\or on what basis Agency "X" can claim that it ought to have been given a hearing before such a decision was made, escapes me.

The proper view as stated in the respondent's Notice in terms of Rule 8(10)(c) is that it is indeed wholly within the Lesotho Government's right to decide who to enter into contract with. Advertising services are in essence in the nature of contractual relationship between the advertiser and the advertising agency. Such

agency may take the form of a newspaper, magazine or such other form of public media as Television or radio. I fail to see how the decision by Government and its parastatals contained in "CRR1" not to advertise with Mo-Afrika, has to do with Mo-Afrika's freedom of speech or expression. In my view this decision does not contravene the law in any manner. Thus the application of Section 12 of the Constitution and\or an appeal for the application of the principles of natural justice would seem to me to be wrongly claimed.

With regard to the complaint that parastatals are not arms of Lesotho Government therefore the restriction between them and the 1st applicant has been applied high-handedly, it seems to me that it would be wrong to ignore, at its lowest, the fact that the word "parastatals" denotes State-owned public enterprises. Once this is appreciated and understood it would seem that the applicants' grievances are baseless. In any event the 1st applicant has not established its *locus standi* for purposes of holding any brief for parastatals. This attitude is at variance with the oft-repeated statement of law in our jurisdiction that the Roman Law doctrine of *actio populi* was never part of the Roman Dutch Law which forms the basis of the Law of Lesotho.

The applicants complain of discrimination by the respondent and rely on

Section 18(2) of the Constitution which provides :

> "Subject to the provision of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority".

The key words, in my view, in the above section are the functions of any public office or any public authority. This being the case it becomes necessary to consider whether in advertising with newspapers the Government is acting in the performance of a public office. I think not. Certainly this is not what Governments are for. Any Government exists for and has as its object the promotion of the welfare of its peoples, socially, economically, politically etc. This is the sense I understand functions of public office to entail. This sense excludes activities related to sending of advertisements to newspaper agencies. Such an activity is not a performance of functions of a public office. But where it takes place and results in commercial activity one should consider whether such is peculiar to public office or authority. Then it would seem the answer should be no; because individuals do send advertisements to newspaper agencies and in so doing it would be absurd to say they perform functions of a public office or authority.

By contrast and comparison geared at achieving clarity it should be stated that

in the case of the Government it is the function of its public office or authority to build schools, provide for education of its citizens, upgrade the standard of living, provide hospitals and clinics, houses and employment and some such things. Therefore it is only in the performance of such like functions that discrimination is outlawed by our Constitution. Thus in deciding not to advertise with applicants Government was not involved in the performance of any function attaching to a public office or authority. Thus it would be absurd to say it was engaging in discrimination practices frowned upon by the Constitution.

See ***Constitutional and Administrative Law*** (7th Ed) by Hood Phillips and Jackson at p.438 in reaffirming the view that prohibited discrimination in the performance of functions of a public nature would seem to relate to functions of such nature as providing housing, employment etc. for the citizens :

> "In those areas of the law and life where it is necessary to enter into legal relationships with other citizens - housing, employment, schooling, for example - it has increasingly been recognised that the law must intervene to ensure that the possibility of entering into such relationships is not adversely affected by such factors as an individual's sex, race or religion. Legislation on such matters may be seen as creating a right not to be discriminated against, or a duty not to discriminate".

It is significant that the foundation of the applicants' grievance is not part of what is conceived above as a possible factor or item upon which to base one's claim or complaint by reason of or on grounds of discrimination.

Indeed in its definition of "discriminatory" Section 18(3) says :

> "In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status ....."

and in none of the above categories underlined has it been in the slightest purported by "CRR1" that the applicants are being discriminated against. The reason why government is not to treat with Moafrika is given as MOAFRIKA's negative stance towards Government. Stance negative or in whatever form is no part of factors which the Constitution has specifically set out as constituting discrimination. In brief "CRR1" does not say 1st applicant is discriminated against, if at all, on basis of its political opinion, race, colour, sex, language, religion, birth, status or any of factors referred to earlier. It eludes me then why the applicants think there is support for their complaint in the Constitution when the basis of their claim forms

no part of factors on which to found one's complaint on the basis of discrimination.

Put bluntly the Constitution doesn't say no form of discrimination shall be practised. On the contrary it says no discrimination of the sort set out in its provisions shall be practised. This is a very salutary provision for were it otherwise, it is not hard to envisage courts of law being flooded by vexatious and fanciful cases wherein big time textile manufactures are sued by girls claiming that they are discriminated against because button holes on their coats are on the right unlike those of boys which are on the left. In any case preference for quality should not be confused with or mistaken for discrimination outlawed in the constitution.

With the little that I am able to gather from the 2nd applicant's affidavit which is rather short on usable material but long in querulousness I can do no more than rely on ***Adbro investments Co. Vs Minister of the Interior*** 1961(3) SA at 284-5 by Williamson J where it is said :

> "The Court has jurisdiction in its discretion to inquire into and to determine rights or obligations of a future or present contingent nature even though no consequential relief be claimed."

I hasten to state that Courts are very very hesitant to exercise their discretion to make a determination in circumstances where such determination amounts to a purely academic exercise. Nor, do I think it profitable for a Court to make a

decision that only results in a mere academic interest to the applicant. In other words, of importance is that

> "some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent legal right or obligation must appear or flow from the grant of the declaratory order sought".

The point is rammed home by the submission made by *Mr Makhethe* in paragraph 8 of his heads extracted from p.295 A of ***Adbro*** above that :

> "I have already said that in my view, a proper case for a declaratory order is not made out unless I can see, not only that it is just and convenient to make such an order although no consequential relief is claimed, but also that there is some advantage which should justifiably accrue to the applicant as a result of the order".

In my view, therefore, even if it were proper to declare that "CRR1" is null and void there doesn't seem to be any advantage to accrue to the applicants flowing from that order in view of the fact that no consequential relief is claimed by the applicants.

Finally I am astonished as to what rules were followed in having this application moved before Court. Suffice it to say the application has been brought on Notice of Motion.

Rule 8(8) provides that an application brought on motion "shall set forth a day not being less than five days after service.....on the respondent ....."

If the applicant receives no notification by respondent on or before the 5th day of service that the latter opposes the application then the applicant shall rely on the provision in his papers that "the application will be set down for hearing on a stated day, not being less than seven days after service on the said respondent of the said notice".

My paraphraseology of this Rule shows that at its earliest an application on motion which is not opposed would be set down for hearing not before an expiry of seven days after the respondent had been served with notice. But if the respondent opposes the notice, as has been the case in the instant matter, it stands to reason that the application would take longer than seven days after service of the notice of motion on the respondent before the matter can be set down.

In such instance Rule 8(10) would apply entitling the respondent

(a).....

(b) "within fourteen days of notifying the applicant of his intention to oppose the application....."

And obliging him to

"Deliver his answering affidavit (if any), ..."

But © "if he intends to raise any question of law without any answering affidavit, he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question".

The contextual meaning of the phrase within the time aforesaid in © above should be and is fourteen days.

Rule 8(13) provides that

"Where no answering affidavit..... has been delivered ..... the applicant may within fourteen days of the expiry of such period (i.e. 14 days referred to in 10(b)) apply to the Registrar to allocate a date for

the hearing of the application".

It would seem therefore that the proper application of Rule 8(8) read with 8(10)(c) and 8(13) which should have been followed in this case would have entitled the respondent to a sum of 5 days (referred to in Rule 8(8)) and just less than 14 days (referred to in Rule 8(10)(c) and 8(13)) making a maximum of 18 days aside from 4 days within which on expiry of 19 days the applicant is then, and only then, entitled to approach the Registrar for an allocation of a hearing date.

It is clear then that the respondent was entitled to at least 18 days needed for preparation of its case. But appearing on the papers placed before me the respondent was served with the Notice of Motion on 21-8-96 and required in terms of the notice reflected on the notice of motion to appear in Court on 26-8-96 thus being squeezed within at most six days when it is entitled to at least 18 days; ignoring, even if one were to say the matter could be heard on the 6th day, that the Rule on Computation of time provides that for any acts falling to be done in seven days or less then *non dies* shall be excluded, yet in the instant matter despite that Sunday 25-8-96 was a *non dies* it was nonetheless included, saying nothing of the provision that the first day i.e. day of filing of initiating process is also to be excluded. It seems that the respondent was given barely two days within which to

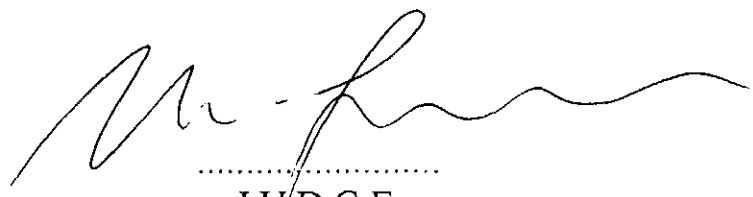
respond contrary to Rule 8(23) also:

No grounds for hearing this matter on urgent basis were set out. No certificate of urgency was filed. No prayer for condonation of all these irregularities the sum total of which was to cause great inconvenience to the other party and lead to undignified functioning of the Court, was made. The respondent was robbed of at least 18 days; of the period it was entitled to prepare its case aside from such period that would lie between the last of those days and the date of hearing.

It was on this ground alone of the non-observance of the Rules of Court that the Court in dismissing this application on 11-2-97 said

> "The point *in limine* is upheld with costs on grounds that the Rule on Applications has been breached in that the applicants confined the respondent to within far shorter a time than do the Rules of Court permit, without leave of Court to do so. See Rule 8.23.
>
> Further the Court takes a dim view of the method employed by the applicants to gain access to "CRR1" which is an interdepartmental document emanating from high-level Government official and addressed not to the applicants but to Principal Secretaries and Heads of Departments"

The Court wishes to demonstrate that it cannot glibly countenance any wanton breach of the Rules by litigants.



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J U D G E
9th April, 1997

For Applicants : Mr Khauoe
For Respondent : Mr Makhethe