CIV\APN\368\96

# IN THE HIGH COURT OF LESOTHO

**In the Application of :**

**ENOCH SEPHIRI MOTANYANE** **1st Applicant**
**NOTSI MOLOPO** **2nd Applicant**
**SHAKHANE ROBONG MOKHEHLE** **3rd Applicant**
**PAKALITHA MOSISILI** **4th Applicant**

**Vs**

**CANDI RATABANE RAMAINOANA (EDITOR, MOAFRIKA)** **Respondent**

## J U D G M E N T

**Delivered by the Hon. Mr. Justice M.L. Lehohla on the 21st day of April, 1997**

On 6th February, 1997 an extended return day; this Court was addressed on points raised *in limine*, following an interim interdict granted by the Chief Justice on 21-10-96.

The applicants, who are Cabinet Ministers in the Lesotho Government sought

urgent relief from this Court against the respondent, an editor of a local newspaper called MoAfrika in the following terms :

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

   (a) Respondent shall not be restrained and\or interdicted forthwith from printing or causing to be printed, publishing or causing to be published and distributing or causing to be distributed articles in the **"MOAFRIKA"** newspaper which falsely and maliciously defame applicants and impair their reputation, integrity, fair name and fame until finalisation of **CIV\T\419\96** and **CIV\T\439\96**.

   (b) Dispensing with the Rules regarding service and filing of process due to the urgency of the matter.

   © Respondent shall not be ordered to pay the costs of this application.

   (d) (*sic*) Order 1(a) operates with immediate effect.

   (e) (*sic*) Further and\or alternative relief.

The application is opposed and as stated earlier points of law were raised on behalf of the respondent by *Mr Khauoe* with a view to, if the Court is sufficiently persuaded in his client's favour, disposing of the matter on that basis and without having any further need to delve into merits.

The points raised *in limine* appear in the respondent's answering affidavit and

are set out as follows in paragraph 3 :

> "1. The applicants have failed to show any urgency or (*sic*) at all which otherwise would have warranted *ex parte* application.
>
> 2. The applicants have failed to show any injury or apprehension that may be committed.
>
> 3.3. The applicants have failed to join the interested parties such as publisher and the proprietor.
>
> 3.4. The attorneys of record being the Attorney-General (*sic*) has no legal right to represent the applicants regard being had (*sic*) that they are suing in their private capacity"

In view of the fact that the points *in limine* were raised on the day of hearing when the Court had gone through all the papers filed, the Court's mind was familiar with the issues covered by the totality of evidence placed before it.

The points *in limine* were augmented in argument and their thrust can be summarised as consisting of the following :

1. That the applicants failed to show such urgency as would warrant application *ex parte*.

2. That there aren't sufficient facts placed before Court to justify the granting of the order.

3. That applicants have failed to aver that this application be treated as an exceptional case.

4. That applicants have laid no basis why the other party shouldn't be served and why Rules of Court shouldn't be followed as to periods of service.

5. That applicants failed to show any injury or threat of injury that would be suffered should the injunction be not granted on facts stated and not mere suspicion.

6. That in view of the fact that the injury sought to be restrained is in the nature of defamation then the applicants aren't entitled to intervention by Court by way of interdict unless it is clear the defendant has no clear defence.

7. That the applicants have failed to join interested parties.

8. That the Attorney-General doesn't have the power or right to represent people suing in their private capacities.

Section 98 of the Constitution of Lesotho to which the Court has been referred by both parties provides that -

1. There shall be an Attorney-General whose office shall be an office in the public service.

2. It shall be the duty of the Attorney-General -

   (a) to provide legal advice to Government;
   (b) .....
   © to take necessary legal measures for the protection and upholding of this Constitution and the other laws of Lesotho;

   (d) to exercise or perform any of the rights, prerogatives, privileges or functions of the State before courts or tribunals; and

   (e) to perform such other duties and exercise such other powers as may be conferred on him by this Constitution or any other law.

3. .....
4. ..... (relevant emphasis supplied)

The Court has found it fitting to attach significance to the phrase or any other law in 2(e) above.

The plain reading of 2(e) leaves me in no doubt that the Constitution leaves it to the law making body i.e. the Parliament to confer such other powers on the Attorney-General as the Constitution does not itself attempt to do.

Following then on the soundness of the principle discernible from the foregoing it is clear that Parliament is at large to give the Attorney-General such other powers over and above those conferred by the Constitution as Parliament may deem proper.

The Constitution has stipulated powers relating to advising Government in 2(a) etc. but has not attempted to set out the portion covered by the phrase such other. It is consonant with common sense and logic that powers covered by this phrase have been left to the function and office of the elected body to signify. At first blush the Attorney-General's powers to represent private citizens would appear

to be out of step. But the Constitution has left the determination of what powers are to be exercised by the Attorney-General to Parliament. This accords with common sense which would otherwise be thwarted and result in dire consequences were Parliament's hands to be tied.

It is in recognition of the principle set out above that Legal Practitioners Act 11 of 1983 section 5 is not inconsistent with any provisions of the Constitution.

Section 5(1) says :

> "Except where specially provided, nothing in this Act shall apply to Law Officers.

Subsection (2) says :

> "Notwithstanding anything to the contrary in this Act or any other Law, Law Officers shall be entitled and shall be considered to have been entitled to perform any work of an advocate and attorney and to appear in the courts of Lesotho on behalf of the Crown, a department of the Government or any officer or person in any Civil proceedings".

Because it behoves good judicial office to broaden constitutional provisions the main purpose of whose is to democratise or enable structures in democracy to make decisions, I find that to include other civilians under the term person appearing in section 5(2) where reference is made to Government Department or any officer or person as bodies to be represented legally by Law Officers in any Civil proceedings, would do no violence to the language of this section.

It is a matter of common knowledge that advocates and attorneys are not confined, in their function of representing litigants, to just one side of only defending their clients. They may institute proceedings as well as defend proceedings on behalf of their clients in any civil proceedings. Thus Law officers seem to be entitled to do the same in performing any work of an advocate and attorney and to appear in the courts of this territory on behalf of categories of litigants (set out in section 2) in any civil proceedings.

Of crucial importance is the fact that this law is prefaced by an all-powerful phrase that notwithstanding anything to the contrary or any other Law, its provisions shall prevail. It stands to reason that even if there had been a provision in any law specifically prohibiting the Attorney-General from providing legal representation to any officer or person referred to in section 5(2) such a provision in any such law would not prevail against section 5(2) of Legal Practitioners Act 11 of 1983. Likewise any interpretation of section 4(1) of Act 6 Office of Attorney-General Act 1994 that seeks to deny any officer or person legal representation ordained by section 5(2) of Act 11 of 1983 would be doomed to failure.

I need go no further then in concluding that Government Ministers are entitled to representation by the Law Officers in any Civil proceedings. The current

proceeding is no exception to such.

Again although Act No.6 Office of Attorney-General Act 1994 speaks in section 4(1) only of persons who are to be defended and not those who institute actions as persons who may be defended at the expense of the State the fact that Act 11 of 1983 entitles Law Officers to appear for persons in any civil proceeding reflected in that Act; and who, according to my interpretation, include Ministers of the Crown, would necessarily include plaintiffs if the phrase any civil proceeding is to be accorded any sensible meaning at all.

The above interpretation would seem to accord with provisions of section 15 of Act 19 of 1977 which says :

> "Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

Thus the earlier interpretation of section 98 of the Constitution would seem to suitably meet the requirement set out in section 15 of Act 19 of 1977 insofar as the objects of the Constitution are, *inter alia*, to democratise and let structures operate in a democratic fashion.

I am buttressed in my view that the word person appearing in Act 11 of 1983 above at first blush seems to mean a person exercising some governmental power, therefore the Law Officer appearing for the applicants is well within his rights because such persons are involved in this litigation with regard to their exercise of governmental power. Furthermore the alleged defamatory statements were made to them in relation to these persons or instant applicants as servants of the Crown in their capacities as Ministers or people running this country as leaders. In this connection then the Law officers are covered and therefore entitled to appear for the above persons as individuals.

The word person as it appears in the above-mentioned section would seem to satisfy the *Noscitur a sociis* test, which is a test of construction of a single word; where there is a string of words in an Act of Parliament, and the meaning of one of them is doubtful, that meaning is given to it which it shares with the other words. So, if the words "horse, cow or other animal" occur, "animal" is held to apply to brutes only. Likewise application of the *Ejusdem Generis* test applying in phrases where the words and\or other are used to complete a sentence inclusion will be made in such a sentence of items or factors which are not at variance with those made mention of in the phrase; heed being paid to the object of the statute that is sought to be preserved or given greater significance to.

Thus while there would be a natural inclination to think that section 4(1) of Act 6 of 1994 relates to defending only and not to instituting actions at the expense of the State it would result in absurdity if the Attorney-General can only represent at public expense persons when sued and not when they sue. Surely the right to defend entails and should entail the right to institute a Civil suit. Otherwise on appeals the Attorney-General would find himself being restricted to the role of representing respondents only in a situation where the defendant whom he represented in a court of first instance lost the action and wishes to go to a higher Court. That would be absurd.

With regard to urgency I would readily agree that given the ongoing onslaught of incessant crusade in the "MoAfrika" newspaper geared not only at ridiculing and pillorying but on the face of it making statements which are defamatory of applicants the latter were entitled to seek urgent relief from the High Court especially if it appeared there was no substance in the defamatory words which cast serious aspersions at the persons and dignity of the applicants who are characterised as or called *inter alia* murderers, thieves and all such despicable characters

With regard to prospects of success the Court has a duty to look at the whole evidence before it consisting of the founding affidavits, opposing affidavits and

replying ones.

The only point raised *in limine* which I think the Court is inclined to uphold is that relating to joinder where the respondent complained that neither the publisher nor the proprietor who are interested parties have been joined.

At paragraph E22 of **Civil Procedure in the Supreme Court - Parties** in a paragraph prefaced by a phrase where joinder necessary it is stated that -

> "If a party has a direct substantial interest in any order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings unless the court is satisfied that he has waived his right to be joined. Where the party is a necessary party, the court will not deal with the issues until joinder has been effected.
>
> The power of the supreme court to order the joinder of parties in an action which has already begun is undoubted. The reason for the existence of this power is that the court is able to ensure that persons interested in the subject-matter of the dispute and whose rights may be affected by the judgment of the court will be before court. Joinder also brings about reduction in the number of actions and consequently a decrease in costs. The power is not derived from any rule of court but is part of the inherent jurisdiction of the court.
>
> The term 'direct and substantial interest' means an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in the litigation".

In the result the Court proposes to make the following orders :

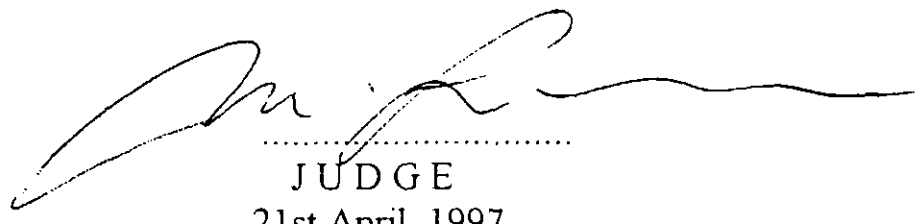
(a) All points raised *in limine* save the one relating to joinder are dismissed.

(b) Because of the respondent's partial success the award of costs against him as respondent\editor shall be 75%.

© The application is postponed to a date to be arranged.

(d) The *Rule Nisi* granted by the Chief Justice on 21-10-96 shall remain of full force and effect pending finalisation of this application.

(e) The applicants are allowed 15 days (of today) within which to join interested parties referred to in (a) of this order.



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J U D G E
21st April, 1997

For Applicants : Mr. Makhethe
For Respondent : Mr Khauoe