CIV\T\439\96

# IN THE HIGH COURT OF LESOTHO

**In the matter of :**

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| **E.S. MOTANYANE** | **1st Plaintiff** |
| **N. MOLOPO** | **2nd Plaintiff** |
| **S.R. MOKHEHLE** | **3rd Plaintiff** |
| **P. MOSISILI** | **4th Plaintiff** |

**Vs**

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| **CANDI R. RAMAINOANE (EDITOR IN CHIEF; MOAFRIKA)** | **Defendant** |

## J U D G M E N T

**Delivered by the Hon. Mr Justice M.L. Lehohla on the 2nd day of September, 1997**

On 6th August, 1997 this Court dismissed with costs as unprocedural the four plaintiffs' application purporting to compel the hearing of applications moved by the defendant before the perceived dates of hearing of two other matters where he was being sued for defamation by one or the same plaintiffs reflected above.

It appears that by some unwholesome act of remissness on the part of the Registrar the application for stay lodged by the defendant and opposed vigorously by plaintiffs set down for hearing on Monday 4th August, 1997 was omitted from the roll even though the notice for hearing on that day had been properly served. None of the parties approached any of the Judges who were not seized of motion proceedings for the day and the matter was, as it were, left hanging as I was away on medical appointment for the day. The matters regarding which a ruling the preceding week would be of interest to the parties were due for hearing on Monday 11th August, 1997 which was the following week. It was important that this ruling be given before that day because one of the things sought by the defendant was that the hearing of those matters should not proceed on 11th August, 1997. But because of the state of the congestion on the roll the earliest this Court could on 6th August, 1997 postpone this matter for hearing was Friday the 8th August 1997. The hearing took an entire day for a matter which appeared outwardly not to involve much to argue about. Consequently the Court was not able to make a ruling before 11th August, 1997. One would have thought that because both counsel in the matter were astute enough to bring to the Court's attention all matters which would be affected and for the Court's convenience provided artificial numbering of four files into volumes I through IV accordingly paginated in continual fashion from the first page in Volume I to the last in Volume IV the same Counsel would ensure that all

else would await the decision in the instant case. One would thus have expected that the hearing of those of the matters which were set down for hearing on 11th August, 1997 would be automatically suspended pending my ruling in this matter. But Lo! when I came hoping to peruse the records and familiarise myself more closely with the material I had been supplied with relating to all these four volumes I found that Volumes I and II had surreptitiously been snatched from my Chambers and a hearing concerning them conducted before a different Judge. Apart from such practice being totally unacceptable it is one that is bound to result in untold confusion in the administration of justice in this Court. It is even the more reprehensible as it bears the appearance of universally reprobated attempt to play one judge off against the other. It behoves the Registrar therefore and indeed Counsel who are officers of Court to ensure that such practice does not flourish. I accordingly decided to deal with matters as they were argued before me and without regard to whatever rulings ensued on hearings relating to trials in Volumes I and II.

***Mr Khauoe*** appearing for the defendant in Volume II stated that the application moved was for stay of proceedings in that Volume and in Volumes I, III and IV pending the outcome of an appeal, C of A (CIV) No.15 of 1997/

It was in CIV\APN\368\96 where the applicant Ramainoane had challenged

the Attorney General's right to represent individuals suing in their personal capacity. The applicant has appealed against this point and his appeal is still pending. The problem facing the applicant in this regard is at least two-fold. First as clearly indicated his stance goes against the principle embodied or outlined in CIV\APN\304\96 ***Moafrica and Another vs The Attorney General*** (unreported) at page 9 that

> "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".

Likewise in the instant matter the law society is quite competent to take action against the Attorney General if aggrieved by the allegation made by the applicant, without having to have the applicant as its crusader in that regard. Next, the point complained about by the applicant was argued *in limine* in CIV\APN\368\96 ***Motanyane & Others vs Ramainoane*** and inasmuch as the order granted in that matter on page 12 paragraph (e) that the applicants were "allowed 15 days within which to join interested parties" it becomes clear that the point decided was interlocutory and could as such not be appealed against without leave of this Court. The rule is that an aggrieved party is entitled as of right to appeal against final decisions of this Court. But as clearly indicated this is not one such decision. It was

argued that what was in point affected the Constitutional rights of the applicant and as such does not require leave of this Court and therefore needs to be clarified by the highest court of this land. I am aware of no law that entitles anybody to ride rough shod on the jurisdiction of a Court whose exercise of that jurisdiction derives from the same Constitution. The salutary rule is that resort should not be had to the extraordinary while the ordinary still avails. Moreover it is of vital importance that the jurisdictions of the High Court and that of the Court of Appeal be kept apart without one intruding upon the other. Thus it cannot avail to say a matter dealt with and decided under the High Court's jurisdiction should not be carried into execution pending results in a pending appeal bearing in mind two things. First, that an appeal to the Court of Appeal does not automatically stay execution of the decision of the High Court giving rise to that appeal. Next that the applicant's *bona fides* are questionable in that he sat back all this while from 21st April, 1997 when the High Court gave its decision only to seek to interfere with progress of other matters which he must have long been aware that they were to proceed within a week of his attempt to stop their progress and at once stay execution in CIV\APN\368\96 also. Thus prospects of success on appeal in my view would seem to be non-existent given the defects attendant on the applicant's contentions.

To give background to the factor of delay and apparent manifestation of lack

of *bona fides* on the part of the applicant it would be beneficial to adopt the outline in ***Mr Makhethe's*** heads as follows :

1. In CIV\T\419\96 the plaintiff has sued the defendants for damages for defamation. The case was instituted as far back as 24th September, 1996. It is now almost one year old and yet still pending, unheard. It is set down for hearing on the 11th August, 1997.

2. In CIV\T\439\96 plaintiffs have sued defendant for damages for defamation. The case was instituted as far back as 10th October, 1996..... it is also set down for hearing on 11th August, 1997.

3. In CIV\APN\51\97 applicants have sought against respondent an order of committal to prison for contempt of Court. The case was lodged as far back as 12th February, 1997 on urgent basis. It is now about 6 months old and still pending, unheard despite that it came by way of urgency. It is set down for hearing on 21st October, 1997.

4. In the papers before it the Court has time and again been referred to CIV\APN\368\96 which is very much intertwined with all the above cases as follows : it is an application seeking an interdict against respondents therein to desist from falsely and maliciously publishing (material) vilifying applicants.

I have already indicated that the applications for stay smack of a concerted

effort to delay. In his own evidence the applicant has indicated that he is applying not for stay in the main cases, but the decision by the Court of Appeal on the question of the Attorney-General's right to represent the Ministers. Thus on this score there seems to be no ground why CIV\T\419\96 and CIV\T\439\96 should not proceed on days on which they are scheduled to do so, nor why CIV\APN\51\97 should not likewise do so.

As a guiding principle courts of law have devised means by which certain criteria have to be met before stay of execution can be granted. Courts have appreciated that stay of execution cannot be obtained for the mere asking. Thus they grant it both sparingly and in exceptional circumstances. See ***Western Assurance Co. Vs Caldwell's Trustee*** 1918 AD 262 at 274.

A party who seeks stay of execution is put under the necessity to place sufficient material before Court in the form of either facts or contentions of law, or both, justifying the departure from the general rule.

Thus proceedings will be stayed where they are shown to have been vexatious or frivolous or where their continuance may prove to be an injustice or embarrassment to the other party.

Advocating the view that strong grounds are required to justify stay *Van Winsen et al* in **The civil Practice of the Superior Courts in South Africa** (3rd Ed.) At p.267 say -

> ".....it is not enough, for example, to show that the story told in the pleadings is highly improbable and one which it is difficult to believe could be proved. The applicant must go further and show that the action is hopeless or impossible of success, for it is only where the case 'stands outside the region of probability altogether and becomes vexatious or it is impossible' that the court will grant a stay".

The plaintiffs in their suits for defamation have referred to publications by defendant showing wanton attacks on their characters and good name. To date no pleas have been filed by the defendant. On what good ground then would a court of law stay the hearing of matters scheduled for hearing for purposes of aggrieved parties clearing their names without delay? Why should the Court grant stay of execution of its judgment if to do so is to subject the judgment creditor to further indignation? In keeping with the principle that it concerns the state that litigation should come to an end I think stay of execution is not warranted on the papers before me.

The Court takes a strong exception to an application of the sort which seeks to stop proceedings in trials where no pleas have been filed to give an indication what the applicant's probable defences are going to be yet at once the applicant

seeks the court's intervention in his favour. An appropriate order as to costs would not be out of step when the stage for consideration of that aspect of the matter has been reached, taken along with the rest of all other points raised and argued in this case.

This immediately leads me to the question whether the filing on behalf of the applicant of notice in terms of Rule 32(7) was in time or not. I didn't have full argument of this question because while ***Mr Makhethe*** raised it in answer ***Mr Khauoe*** dealt with it in detail in reply.

Accordingly the Court had reference to Rule 1(I) with regard to interpretation accorded by this Rule to "days". This Rule says

> "Days shall mean court days except that in the computation of time expressed in days prescribed by these rules and fixed by any order of court, Saturdays shall be included except those Saturdays which are public holidays. Provided that when the last day of the number of days prescribed is a non day or Saturday the time shall end on the next court day....."

I need indicate briefly that in terms of Rule 30(1) a party to an irregular proceeding may take steps within 14 days to set aside such improper or irregular proceeding. If a party has reacted to an irregular proceeding while fully aware of it as if it is not irregular then he shall be deemed to have acquiesced in the

irregularity. See CIV\APN\89\96 ***Dorbyl Vehicle Trading Finance Co. (Pty)Ltd vs Mokheseng*** (unreported) at p.4. An application of the principle invoked in the foregoing can be clearly discerned from a parallel view expressed in ***Bank van die Oranje - Vrystaat BPK vs Cronje*** 1966(4) SA at page 4, that :

> "A notice of intention to defend, which is *ex-facie* late but which has been filed with the Registrar cannot be disregarded as it is not necessarily irregular. When a pleading is filed late and a party objects thereto on the ground that it is irregular then he must not proceed with the action as if the pleading does not exist. He must apply to the Court in terms of Rule of Court 30, for the setting aside thereof".

Thus page 13 on Volume I the notice in terms of Rule 39(2) and (3) filed by the Attorney General's office would tend to fall within the terms of the proviso to Rule 30(1).

***Mr Khauoe*** thus indicated that the applicant's notice in terms of Rule 32(7) was filed on 20-1-97. See Rule 26(2) to the effect that a party who fails to deliver a pleading shall be entitled to be served with notice in response to which he is required to act within three days of the notice having been served on him.

It would seem to me therefore that the notice in terms of Rule 32(7) was filed on time. It should be plain that in the view this Court takes in this matter the operation of Rule 32(7) is to no avail because there is nothing in the case that

warrants staying of further proceedings pending disposal by oral evidence or otherwise of any separate question.

I therefore rule that the defendant is not barred from pleading. Consequently he is put to terms to file his plea within seven days of today if he is inclined to file any plea at all. Otherwise his matters will thereafter be dealt with in terms of relevant Rules.

I indicated earlier that the Court has detected brazen preference for delay in the applicant that therefore a suitable order as to costs is called for. Accordingly the applications for stay of execution and for suspension of the hearing of pending trials and application are dismissed with costs. The applicant's partial success with regard to timeous filing of the notice in terms of Rule 32(7) entitles him to a set-off of 15% of the respondent's total costs. In other words he shall have met the requirements of this judgment by payment of 85% of respondents\plaintiffs' costs.

Mr Mphalane has noted Judgment for both parties.

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J U D G E
2nd September, 1997

For Plaintiffs : Mr Makhethe
for Defendant : Mr Khauoe