CIV/T/137B/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MOFANA MAFANYA PLAINTIFF

and

PHAKISO SEHLEKA 1ST DEFENDANT
MOTLALENTOA PHASA 2ND DEFENDANT
THABO NONE 3RD DEFENDANT
MOLETSANE NTHAHA 4TH DEFENDANT
ARRAY TŠEPHE 5TH DEFENDANT
SALAE MOJELA 6TH DEFENDANT
KOSE KHOACHANE 7TH DEFENDANT
THABANG RANTŠO 8TH DEFENDANT
MONTŠI MAKARA 9TH DEFENDANT
KEKETSO SEQOBELA 10TH DEFENDANT
TSENOKA RALEBONA 11TH DEFENDANT
TEBOHO NKOE 12TH DEFENDANT
RALINTJA MANASI 13TH DEFENDANT

JUDGMENT

(**Status of King's Counsel**)

CORAM : HON. MR JUSTICE S.N. PEETE

DATE : 13TH APRIL, 2011.

Summary

Advocate – ***King's Counsel – Referral Practice – Unprofessional for an King's Counsel or advocate to receive instructions directly from client without intervention of an attorney. Public interest – Ethics. Section 32 of the Legal Practitioners Act of 1983.***

A King's Counsel*, being a senior advocate of professional imminence must always preserve high standards of performance in his practice by maintaining high personal integrity and scrupulous honesty. It is professional misconduct for such senior counsel to accept any instructions and fees directly from clients without an intervention of an attorney, or to perform attorney's functions in contravention of the provisions of Section 32 of the* ***Legal Practitioners Act of 1983.***

An advocate *who is dishonest and deceitful should not be allowed to practice – to allow him or her to practice would do a grave disservice to the public and to the legal profession.*

Annotations

Reported cases

- ***Legal Practitioners Committee vs Advocate Rashid Ahmed Karim*** *– 1979 (1) LLR 300; and 1979 (2) LLR 431 (Court of Appeal)*
- ***Mosenye vs Ramone*** *– 1991-1996 (1) LLR 777.*
- ***Masoabi v Fischer*** *– 1978 – LLR 434.*
- ***Lesotho Evangelical Church v Samuel Mohlomi*** *– CIV/APN/111/2004*
- ***In re Rome*** *– 1991 (3) SA 291.*
- ***De Freitas v Society of Advocates of Natal*** *– 2001 (3) SA 750.*
- ***General Council of Bar of South Africa v Rőseman*** *– 2002 (1) SA 235.*
- ***Kekana v Society of Advocates of South Africa*** *– 1998 (4) SA 649 (SCA).*

- ***General Council of Bar of South Africa v Van der Spuy*** *– 1999 (1) SA 577.*

- ***Lees Import and Export vs Zimbabwe Banking Corporation –*** *1999 (4) SA 1119 (ZSC)*

Statutes

- **Constitution of Lesotho 1983.**
- **Legal Practitioners Act No.11 of 1983.**
- **Law Society Act No.13 of 1983.**
- **High Court Rules 1980.**
- **Halsbury's Laws of England – Vol.3 (1) and Vol.44.**

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Peete J.:

[1] When this matter was called on the 3rd March 2011 **Mr Mahlakeng** for the applicant objected to **Mr Mohau KC's** appearance before this Court upon the main ground that **Mr Mohau KC** had no right of audience because he **Mr Mohau KC** had not been instructed by an attorney practicing in Lesotho.

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Dual Practice *– (Advocates and Attorneys)*

[2] As in South Africa, the legal profession in Lesotho has always consisted of the following:- – (1) **Advocates**[1] – some of whom are

[1] A law graduate who has successfully obtained a **Bachelor of Laws** degree at the National University of Lesotho qualifies to be admitted as advocate of Courts of Lesotho upon his or her being confirmed as a fit and proper person to be admitted; other advocates are civil servants or corporate employees..

now King's Counsel, and (2) **Attorneys**[2] – some of whom are conveyancers and notaries public. We thus have a dual system consisting of advocates who must be briefed by attorneys for their appearance and audience in court[3]. This duality is provided for under the **Legal Practitioners Act No.11of 1983** and until any fusion of the two professions is brought about, this duality must continues.

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[3] In the case of **Comama Mosenye vs Pheello Ramone**[4]**,** it was ruled by **Maqutu J.** (as he then was) that an advocate cannot practice in an attorney's office. The learned Judge opined:-

> *"…it is illegal. Advocates should not pretend to be attorneys as long as the distinction exists…."*[5]

[4] As **Cotran C.J**. commented in 1978 in the **Masoabi** case **–**

> ***"…****It seems clear on the fact of things, that the legal profession is not fused at common law …barrister's fee….is not recoverable …. A blind eye has in the past been turned to advocates accepting direct briefs…"*[6]

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[2] An attorney has usually passed the **Attorney's Admission Examination** or has served a requisite term of articles of clerkship – see **Legal Practitioners Committee vs Advocate Karim** – *1979 (1) LLR 300* at 307 per **Rooney J.**

[3] **Rule 17** of the **High Court Rules 1980**.

[4] **1991-1996** (1) LLR 777; see also **Masoabi v Fischer** – 1978 LLR 434 (per **Cotran CJ**)

[5] At page 780 – see *sections 31 (5*) and *32* of the *Legal Practitioners Act of 1983*.

[6] See **1991-1996 (1) LLR 777**; See also **Masoabi v Fischer** – 1978 LLR 434 (per **Cotran CJ**)

[5] In our democratic dispensation, we must have transparency and openness in our institutions and in our profession and no longer should *"blind eye"* be turned upon important issues that affect the rights of the public and of the general clientele.

[6] It is in the public interest that the attorneys who receive instructions and fees from clients in trust and confidentiality should hold these instructions and funds in sacred trust for their clients. Advocates on the otherhand profess their legal skills in court upon instructions from the attorneys. Advocates keep no trust accounts and should get their clients' instructions only through the intervention of attorneys.

[7] Advocacy is traditionally a "*referral practice*". Thus an advocate cannot meet a client without the intervention of an attorney who should receive direct instructions and fees from the client. The law also obliges an instructing attorney to keep a trust account wherein monies held in trust for the client are to be kept until the completion of the case[7]. Advocates do not keep trust accounts and are not expected to receive instructions from clients without intervention of attorney neither can an advocate practice in partnership with an attorney![8] It should be added that advocates – being legal practitioners – are also obliged to contribute to the Fidelity Fund[9] which protects

[7] *Section 27* of the **Legal Practitioners Act 1983**. Advocates keep no trust accounts.
[8] See Section 6 (2) (a) and (b) – It reads
[9] *Section 5* of the **Law Society Act 1983**.

the client against losses occasioned by dishonesty of a legal practitioner.

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King's Counsel (or ***State Counsel***)

[8] When a King's Counsel or State Counsel appears in any case, and after all the exchange of all protocol pleasantries in chambers – it is generally assumed by the Court, and rightly so, that the King's Counsel (being a most senior advocate) has been properly instructed by a junior advocate who in turn has received instructions from a client's attorney. This referral practice and instruction is required under the **Legal Practitioners Act No.11 of 1983.**[10]

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Royal Conferment of Honour and Dignity.

[9] *Section 7 (1)* of the **Legal Practitioners Act No.11 of 1983** reads:-

> *"7. (1) The King may, on the recommendation of the Chief Justice, confer the honour and dignity of King's Counsel to advocates who have rendered distinguished services in the law practice in the Courts of Lesotho".*

[10] *Section 32* (see para 7 infra)

- In England, where they have barristers and solicitors the position occupied by a King's Counsel was originally in the nature of an office under the Crown … it was also in the nature of an honour or dignity to the extent that it was a mark and recognition by the Sovereign of the professional imminence of the barrister.[11]

- A Kings' (Queen's) Counsel is an advocate of professional imminence who has received this title of honour from His Majesty the King. Attorney General is the First King's counsel and all other King's Counsel rank in ascending seniority not according to age or long practice as advocates but according to the dates when they received the honour from His Majesty The King.

  A King's Counsel has a right of precedence to be heard by the court before all other junior advocates and attorneys in court. His or her submissions are usually considered with great respect because they are from an advocate of professional imminence. The Court however has the ultimate right to rely or reject such submissions depending upon the facts of the case and law applicable.

[11] **A-G for Dominion of Canada vs A-G for Province of Ontario** – [1898] *AC 247* at 252 (HL per **Lord Watson)**

- A King's (Queen's) Counsel has always remained for ever an advocate (barrister) of professional imminence and a trusted officer of court. In England some of the King's Counsel have often later received the honour of being elevated to the Bench of the superior courts after illustrious careers at the Bar.

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Referral Practice of Advocates and King's Counsel

[10] *Section 32* of the **Legal Practitioners Act** reads:-

> ***"32. An advocate engaged in practice shall not appear in a court in Lesotho, unless in addition to the other requirements of this Act or any other law, he has been instructed so to appear by the First Law Officer of the Crown (Attorney General) or an officer delegated or by a practicing attorney engaged in full time practice in Lesotho".*** (my underline)[12]

The imperative terms of this *section 32* are very clear and cannot and should not be waived or undermined whether by a King's Counsel or even by a most junior advocate. Advocacy remains in Lesotho a referral practice, and an advocate commits a professional misconduct if he receives instructions from client without an intervention of an attorney.

[12] See also Rule 17 (1) of the High Court Rules 1980.

[11] Once an advocate has been admitted as such, *section 32* of the **Legal Practitioners Act** kicks into play; an advocate should not practice as an attorney behind closed doors of his chambers because in so doing he or she is violating the law and is being deceitful and dishonest to the court, of whom he or she is an officer.

[12] Where therefore it is alleged and proven that a King's Counsel – against good law and practice – appears without proper instruction – such conduct can surely be classified as unprofessional as well as unethical. Such conduct deserves full censure – as it sets a bad example to junior counsel.

[13] If the King's Counsel's appearance is being impugned or challenged, at once it is incumbent upon the King's Counsel to establish and clarify his instruction thereby putting things right. His title must forever remain untarnished.

[14] It must however be clearly accepted by all concerned that the Court is today presently not sitting to decide whether any unprofessional or unethical conduct has in fact occurred. **Mr Mohau KC** is not being investigated at all as no complaint has been presented formally before this Court.

[15] That the advocate's – hence King's Counsel's – profession is a "***referral profession***" has been resoundingly repeated by the Supreme Court of Appeal of South Africa in **De Freitas and Another vs**

Society of Advocates of Natal – 2001 (3) SA 750;[13] **Corbett CJ** had this to say in **In re Rome:**[14]

> *"…Here we have what has been described as the divided Bar (see Joubert (Ed) **The Law of South Africa** (vol.14) para 246). It is a legacy from Holland and also from England. Legal practitioners thus fall into one or other of the two groups, the advocates and the attorneys. Each group has its professional bodies, which determine the rules by which their members must consult their practices, take action to ensure that members adhere to the rules, scrutinize and, where appropriate, take action regard to applications for membership of the profession and generally see to the interests of members and the profession. The advocate is, broadly speaking, the specialist in forensic skills and in giving expert advice on legal matters, whereas the attorney has more general skills and is often, in addition, qualifies in conveyance and notarial practice. The attorney has direct links (often of a permanent or long-staning nature) with the lay client seeking legal assistance or advice and, where necessary or expedient, the attorney briefs an advocate on behalf of his client. The advocate has no direct links or long-standing relationship with the ay client: he only acts for the client on brief in a particular matter and is normally precluded by Bar rules from accepting processional work direct from the client. The attorney is responsible to the advocate for the payment of professional fees due to the latter by the client and for the recovery of these and his own fees and disbursements from the client: the advocate has no direct financial dealings with the client. An attorney is responsible for the keeping of trust funds; an advocate is not. Duly instructed an attorney, the advocate had the exclusive right of audience in the different Divisions of the Supreme Court and concurrent rights of audience, with attorneys, before lower courts and other tribunals. Attorneys may, and often do, practice in partnership with fellow practitioners; whereas partnership between advocates at the Bar are not permitted. An attorney's practice is a disposable asset: an advocate's practice is not."*

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[13] See also **General Council of the Bar of South Africa v Van der Spuy** – *1999 (1) SA 577*; In re **Rome** *1991 (3) SA 291* **Corbett CJ** at 305-6.

[14] See also **General Council of the Bar of South Africa v Van der Spur** – *1999 (1) SA 577*; I **re Rome** *1991 (3) SA 291* **Corbett CJ** at 305-6.

[16] These words are most apposite and to the point. An advocate, broadly speaking practices a court craft which requires forensic legal skills; and the advocate provides professional advice on legal matters and advocates the cause artfully in court on behalf of client. The attorney has more general skills and is often, in addition, qualified in conveyancing and in notarial practice. Traditionally in Lesotho, only the advocates enjoyed the right of appearance in the High Court and in the Court of Appeal upon instructions by a practicing attorney. The generic description "*legal practitioner*" under the **Legal Practitioners Act 1983** permits attorneys to appear independently in the High Court and in the Court of Appeal. This hybrid scenario has unwittingly brought about a *"free-for-all"* fiasco and worse, still some unethical practices by some unscrupulous advocates and attorneys. Courts can thus be continually deceived and hoodwicked and client's trust moneys used for wrong purposes by such advocates and attorneys. All this is wrong and must come to an instant stoppage.

[17] A practicing King's Counsel or any practicing advocate must never ever share partnership with another advocate or with a practicing attorney because he or she cannot be liable to client for any professional misconduct; and a King's Counsel cannot even claim fees from client or from attorney. King' Counsel's as well as the advocate's fees are strictly "*honoraria"*. Attorneys' fees "*are in trust*" till professional services have been rendered to client.

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Role of Advocate

[18] The role of an advocate is to represent the cause of client as instructed by an attorney. He does so to the best of his best ability and skill. He advises the court on the evidence adduced and presents researched submissions in law. Most advocates are specialized in many fields in law e.g. criminal law, international law, corporate law, banking, prosecution, family law etc. Technically they do a lot of research and many have cultivated great skills in the art of advocacy.

[19] As **Thring J**. said in **General Council of the Bar of South Africa v Rősemann**[15]**:-**

> *"...It is not proper in my view, for an attorney to shuffle off these functions onto the shoulders of an advocate by simply briefing the latter to attend to them on his own, nor can it be proper for counsel to accept such a brief. I hasten to add that there can, of course, be no objection to counsel being briefed to advice an attorney on how to deal with a specific problem which may have arisen in a particular matter; for example, in connection with discovery, or the service of process, or the execution of an order, or to assist an attorney in drafting a particular document, or to settle its terms. Indeed, these are situations which occur in legal practice every day. In such a case the advocate advises or assists the attorney concerned so that the latter can the better and more effectively perform his own function. Counsel does not himself perform the attorney's functions, which remain, ultimately, the latter's responsibility. That is a far cry from the situation where the attorney divests himself of these function, as it were, washes his hands of them, and passes then over to the advocate to perform in his stead without any further active participation by the attorney..."*

[15] *2002 (1) SA 235* at 245 B-E

[20] If these hallowed principles and practices are daily being adumbrated by some our learned King's Counsel recently appointed by the His Majesty The King at the recommendation of the Honorable Chief Justice, Kings' Counsel "*do so at their own peril*" because they are liable to be guilty of unprofessional conduct of privately accepting instructions and fees from clients without intervention of attorneys[16].

[21] Undoubtedly a King's Counsel in Lesotho is a new phenomenon at the Bar and problems (logistical or otherwise) may come to the fore before a King's Counsel appears in Court e.g. "**attorney scarcity**". But once he has accepted the honour and dignity, a King's Counsel must however exhibit very high ethical standards and honesty and he dare not commit any act that is seemingly unethical or unlawful, whether in his chambers or in Court.

[22] In accepting an honourable appointment as King's Counsel, these advocates have undertaken to adhere to high moral and professional standards[17] and above all, to avoid receiving instructions from clients without intervention of practicing attorneys. If they do so, I repeat *"…they do so at their own peril…"*.[18]

[23] Thus where a King's Counsel in Lesotho – once or on a frequent basis surreptitiously and behind the closed doors of his chambers, meets and receives instructions from clients without an intervention of a practicing attorney, he does so at his own peril and he is liable to be

[16] **De Freitas vs Society of Advocates of Natal** – 2001 (3) SA 750.
[17] **Kekana v Society of Advocates of South Africa –** *1998 (4) SA 649* (SCA)
[18] **Rősemann** case at page 247 B-C

charged with professional misconduct and if found guilty is liable to suffer some of the extreme penalties. For example, in the case of **Legal Practitioners Committee v Advocate Rashid Karim**[19] – and on the 15th June 1979, **Rooney J** in the High Court of Lesotho removed the name of respondent – **Advocate Karim** – from the roll of advocates upon grounds that he had been proven guilty of gross unprofessional conduct by not keeping clients' funds separate from his own and of having dishonestly used his clients' money to disgracefully finance his own private business. The striking off of this advocate was confirmed without hesitation by the **Court of Appeal of Lesotho** in its decision in *1979 (2) LLR 431,* **Maisels P**. deploringly describing the advocate's conduct as completely disgraceful and that his continued practice would do grave disservice to the public and to the legal profession in Lesotho.

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Right of audience

[24] The right of audience enjoyed by advocates and King's Counsel in Lesotho is qualified by *section 32* of the *Legal Practitioners Act* which requires an intervention of an attorney before an advocate may exercise the right of appearance.[20] The special Attorney/client relationship is *fiduciary* in that it involves trust and confidentiality.

[19] *1979 (1) LLR 300*
[20] See also *Rule 17 (1*) of **the High Court Rules 1980**.

[25] The Halsbury's Laws of England state as follows:-

> *"in deciding whether to impose or remove restrictions on rights of audience, the judges should have regard solely to what is required in the public interest for the efficient and effective administration of justice and not to the interests of the lawyers concerned.*[21] *There is a recognized public interest in limiting the categories of persons whom the courts are prepared to hear as advocates to ensure that the advocates appearing in a particular court have the requisite standard of skill and high standard of probity."*[22]

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Constitutionality of Referral Practice

[26] The restriction on advocates to appear before the courts without instructions from an attorney in no way attenuates the client's right to be represented by *"...a legal representative of his own choice..."* under *section 12* of the **Constitution of Lesotho** nor does it in anyway infringe the client's constitutional right of access to the courts.[23] It is that very fundamental right of the client that far outweighs the advocate's right, and one that deserves protection more than the advocate's right of appearance in court. It is what is required in the public interest for efficient and effective administration of

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[21] See **Absa v Smith** [1986] QB536/546; [1986] 1 All ER 350 at 353, 354, 361.
[22] Halsbury's Laws of England (4th Ed) Vol. (1) para 396 (Barristers)
[23] **Lees Import and Export v Zimbabwe Banking Corporation** – *1999 (4) SA 1119 (ZSC)* – **Gubbay CJ. –** see *section 34* of **the Constitution of South Africa.**

justice and not the individual interests of the lawyers concerned,[24] that deserves protection under the law.

[27] In my view, if the advocates – who are by law not required to keep trust accounts were to privately hold the clients' monies in their own accounts and yet having no relationship fiduciary with clients – were to function without intervention of attorneys, this would gravely endanger the interests of most clients throughout Lesotho. Clients' money would not enjoy protection under law – and remove any recourse where the funds are misused by advocates. This is clearly inimical to public interest and should not be countenanced by our courts of law.

[28] Panacea for this dilemma would seem to be either to fuse under law the professions of advocates and of attorneys (like in Zimbabwe)[25] or to comply strictly with the requirements of *section 32* of *Legal Practitioners Act f 1983*.[26]

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[29] Indeed **My Ladyship Majara J**.[27] recently ruled that *Rule 17 (1)* of the **High Court Rules 1980**[28] makes it imperative that *"...a King's*

[24] See **Halsbury's Laws of England** (4Ed) Vol. 3 (1) para 396.
[25] In Zimbabwe they have a De Facto Bar for Advocates but exclusive right of audience in the High Court is removed and the Law Society controls the professional conduct of advocates and Attorneys [See hapzhou@africaonline.co.zw (00263772434106) – Harare – Zimbabwe]
[26] See **Legal Practitoners Committee v Advocate Ahmed Rashid** – *1979 (1) LLR 300 at 307* per **Rooney J**.
[27] **Lesotho Evangelical Church v Mohlomi** – *CIV/APN/111/2004*.
[28] *Legal Notice No.9 of 1980*.

Counsel ought to be briefed by an attorney before he can be given any audience in this Court…" and his Rule 17 (1) reads:-

> *"17. (1) The following persons are entitled to an audience in the High Court*
>
> *(a) a litigant;*
>
> *(b)* ***an attorney;***
>
> *(c)* ***an advocate, only when duly instructed by an attorney.****"* (My emphasis)

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As I have already pointed out Rule 17 (1) above in no way attenuates the ordinary person's constitutional right to "*a legal representative of his own choice"* and in fact protects it.

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[30] There was not cogent reason to suspect that **Mr Mohau KC** had not been properly instructed when he appeared before court and without imputing any label of impropriety on **Mr Mohau KC** that he has committed any conduct that is unethical or unprofessional, he is now directed by this Court to establish that he has received his instructions through an intervention of a practicing attorney in the case now before court.[29]

[29] This was also done by **Majara J**. in **Lesotho Evangelival Church v Mohlomi** (*supra –fn. 16*)

[31] Being the most senior members of an honourable profession, all King's Counsel are for ever officers of the Court to which they owe deep respect and honesty, and to which they must demonstrate very high standards of integrity and probity. They must set themselves as "**role models**" for the younger legal practitioners to emulate.

[32] It is the fundamental duty of the *Law Society of Lesotho*[30] is to ensure and ascertain that proper standards in the legal profession both in and outside court are maintained. Public confidence and trust will undoubtedly ebb where basic standards erode and clients get a raw deal. Practitioners should not delight in acting unethically hoping to "*get away with it*". This Court and other courts must ensure that proper standards and goods practices are maintained in the legal profession in Lesotho at all times and everywhere. If it be the best option The Law Society is fully entitled to initiate steps to reform of the law and bring about fusion as soon as practically possible, otherwise the law as it stands must be complied with by all legal practitioners – and this without fail.

[33] The court takes this opportunity to recommend that all advocates and attorneys in Lesotho read the following:-

1. **"*Barristers*"** – *Halsbury's Laws of England* – Para 351-536 (Volume 3 (1)

[30] **Law Society Act No.13 1983**

2. ***"Solicitors"*** – *Halsbury's Laws of England* – Para 1-400
(Volume 44)

These two important Chapters provide the "*dos*" and "*donts*" for advocates and for attorneys in their respective practices and as a reliable "**Charter**" they shall guide them in their honourable profession and in their future careers.

[33] The matter is postponed to 3rd and 4th day of May 2011 on which date this case must begin and proceed to finality.

S.N. PEETE
JUDGE

For Plaintiff : **Mr Mahlakeng**

For Defendants: **Mr Mohau KC**

Copy to: **Law Society of Lesotho**