

IN THE HIGH COURT OF LESOTHO

CIV/APN/271/2014

In the matter between:

TSOKOLO MAKHETHE KC

APPLICANT

and

PRIME MINISTER

1ST RESPONDENT

GOVERNMENT SECRETARY

2ND RESPONDENT

THE MINISTER OF LAW, CONSTITUTIONAL

AFFAIRS AND HUMAN RIGHTS

3RD RESPONDENT

THE OFFICE OF THE ATTORNEY – GENERAL/

DEPUTY ATTORNEY GENERAL

4TH RESPONDENT

Coram: Nomngcongo J

Date of Hearing: 9 September 2014

Date of Judgment: 2 March 2015

JUDGMENT

[1] On the 19th June 2014, the applicant approached court for orders in the following terms.

- (a) That the respondents is (sic) hereby interdicted and restrained from in any way interfering with or preventing the applicant from continuing to discharge his duties as the duly appointed Attorney General of Lesotho.

Alternatively, taking such steps to aside any steps that may have been taken to that effect.

- (b) That respondent is (sic) hereby interdicted and restrained from in any way depriving, removing, restricting as otherwise taking away applicant's salary and all other benefits and entitlements and privileges that he presently enjoys as the duly appointed Attorney General of Lesotho including but not limited to his salary, motor vehicle, housing and pension benefits, cellphone benefits and any other benefits whatsoever attaching to his position as Attorney-General. Alternatively taking steps to set aside any steps which may have been taken to that effect.
- (c) That the respondents be restrained and interdicted from advising His Majesty the King to appoint any person as the Attorney-General, pending the outcome of this application.

[2] As a result, and cost a view to resolving the issues relating to applicant's tenure, a consent order in the following terms: was granted:

1. By consent the matter is post-poned sine die to be enrolled if settlement discussions fail.
2. In the interim the Attorney-General will continue to function as such and to obtain his benefits. The keys and car are to be returned to him.

3. If the matter does not come back to court the status quo shall be maintained until the matter is finalized.

[3] Pursuant to this order, the Attorney-General resumed duties in his capacity as such. This was followed by correspondences between the applicant's attorneys and the respondent's in an attempt to come to some settlement. The exercise did not appear to make much headway. Among the correspondences was one date 7th August 2014 in which the applicant's attorneys indicated that they would await the outcome of the judgment in the DPP's matter in CIV/APN/271/014. The correspondence was annexed to the applicant's founding affidavit. The DPP matter was an application in which the DPP sought relief in almost identical terms as the present applicant in the High Court in its constitutional jurisdiction. That court essentially dismissed the DPP's application.

[4] Following that, the Government Secretary, second respondent herein, addressed a letter to the applicant directing him to proceed on special leave because in the view of the Prime Minister, 1st respondent herein, the outcome of the judgment was definitive of the law until otherwise ruled by the Court of Appeal as to when DPP and by extension the Attorney –General must retire. The applicant deposes says the bearer of the letter was in the company of five police officers, one of whom he identified as Senior Inspector Chechile, who told him to vacate office immediately under pain of physical force should he

resist. He vacated office to avoid being physically man-handled out of his office. Senior Inspector Chechile, the applicant says then took away his office keys from his secretary and subsequently a new set of locks were installed in his office.

[5] It is under these circumstances that he approached court on an urgent basis and ex parte in the following.

1. That the ordinary rules and modes of notice and service of this Honourable Court be dispensed with on account of the urgency hereof.

2. That a rule nisi do hereby issue returnable on a date and time to be determined by this Honourable Court calling upon the respondents to show cause why the following order should not be made.

- 2.1 That the Commissioner of the Lesotho police be joined as the fifth respondents.

- 2.2 That it is declared that the first, second and fifth respondents herein are in contempt of the order granted by the Honourable Court under the above named case on 19 June 2014.

- 2.3 That this Honourable Court sentences the first, second and fifth respondents in respect of such contempt as it deems appropriate.

- 2.4 That the first, second and fifth respondents be ordered forthwith to restore to the applicant his office as

well as all things necessary for him to exercise fully and inhibited his powers as Attorney General of Lesotho.

3. That the relief in paragraph 2.4 hereof shall operate with immediate relief.
4. That the cost of this application be paid by the first, second and fifth respondents jointly and severally, such costs to include the costs of two counsel and taxed on the scale as between attorney and own client.
5. Further and/or alternative relief.

[6] The application appears to have been served on the respondents on the 29th September 2014. The notice of motion indicates that the applicant intends moving the application on the 4th September 2014. Judging from the date stamp on the notice of motion it appears it was filed with the High Court registry on the 3rd September 2014 and my notes indicate that it was moved the same day. I cannot rule out the possibility that I recorded a wrong date and that in fact it was actually moved on the 4th September. On that day, which ever it was Mr. Penzhorn for the applicant and Mr. Mosotho for the respondents appeared before me. Mr Penzhorn insisted that this was a simple matter of spoliation and that it should be disposed of there and then. This was despite Mr Mosotho's objection that he has not been able to contact his clients who were out of the country following an attempted Coup *de tat*. I considered that it would not be fair to the respondent if we did not hear their side of the story and I allowed time

for them to file their answer and the applicant his reply thereto. The second respondent filed his answering affidavit but not the first. The applicant did not file any reply.

[7] Be that as it may when the matter came up for argument Mr Penzhorn made it clear that he had little interest in pursuing the prayer for contempt. In argument he concentrated on the prayer for spoliation.

[8] The extra ordinary remedy is available to a person who has wrongfully been deprived his right of possession of property whether movable or immovable or of a legal right (see, **Nino Bonino v De Lauge 1906 TS 120**). The requirements for the remedy is proof that the applicant possessed the spoliated thing, and secondly that he was wrongfully deprived of such possession. It is however, not all legal rights that are amenable to remedy. For instance repudiation of contractual obligations have been held not to constitute spoliation. (see **The Law of South Africa – Joubert & Faris 2nd Edition Volume 11 438**).

[9] The crisp issue to decide here is whether a person in the position of the applicant who is the substantive holder of the office of Attorney General can avail himself of this remedy.

[10] The office of Attorney General is an office in the public service. The incumbent of the office for the time being is, as such merely a servant. He enjoys certain benefits as such incumbent. He does not hold the office on his own behalf but on behalf of the public that he

serves, which in turn is represented by government. (see Mpunga v Malaba 1959 (1) SA 513; Du Randten 'N ANDRE V Du Toit 1995 (1) SA 401).

[11] In the letter requiring him to proceed on leave whether special or not it was specifically said that he retained all his benefits pertain to his office pending the outcome of an appeal pending in the Appeal Court. As I said the case was identical to his and the Constitutional Court had ruled adversely against the D.P.P. If the Court of Appeal were to confirm the ruling, it is obvious that the Attorney General would have exercised functions which he would not have had the right to. That instead of asking him to go on leave with full benefits would clearly have constituted a constitutional crisis. None would have been created by requesting him to go on leave.

[12] Instead of doing the honourable thing and going on leave in the face of a judgment by the Constitutional Court the applicant chose to approach this court for a remedy that is not available to him.

[13] The application is dismissed with costs.

Nomngcongco J.
Judge of the High Court

For Applicant : Mr Penzhorn SC

Mr Woker SC

For Respondents: Mr Mosito KC

